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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 116

STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION, H. L. McCRACKEN, CHAIRMAN, ET AL., PETITIONERS,

vs.

BARNSDALL REFINERIES, INC., THE CARTER OIL COMPANY, CHAMPLIN REFINING COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA.

PETITION FOR CERTIORARI FILED JUNE 8, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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[fol. 1] [Caption omitted]

[fol. 2] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 25181

BARNSDALL REFINERIES, INC., et al., Applicants,

versus

OKLAHOMA TAX COMMISSION, MELVIN CORNISH, JOHN T. BAILEY, and W. D. Humphrey, as Chairman and Members of said Commission, and R. B. Connor, as Sheriff of Osage County, Oklahoma, Defendants

APPLICATION FOR LEAVE TO FILE PETITION FOR INJUNCTION TO ENJOIN THE ENFORCEMENT AND COLLECTION OF AN ILLEGAL STATE TAX—Filed Nov. 17, 1933

Come now the Applicants and apply to this Court for leave to file a petition for injunction to enjoin the enforcement and collection of an illegal tax made and levied for a State purpose and show to the Court that the reasons why this action is brought to this Court are as follow-:

1

The Oklahoma Legislature of 1933 passed an Act (Chapt. 132, Session Laws 1933), levying an excise tax of ⅛ of one per cent per barrel on each and every barrel of petroleum produced in the State of Oklahoma, which Act became effective April 10, 1933; that by its terms such Act applies to oil produced in Osage County, Oklahoma and the Applicants claim that such Act is invalid insofar as it applies to such oil production, because all oil produced in Osage County is produced by oil lessees as instrumentalities of the Federal Government in carrying out its obligations and duties to the Osage Tribe of Indians and members thereof, and such excise tax could only be valid as to such Osage Oil production in the event the Congress of the United States, by Act duly passed, had consented thereto and such consent has not been given. This action is sought to be brought in this Court pursuant to Sections 3781 to 3788

[fol. 3] inclusive, Revised Laws of Oklahoma, 1931. Such statutes provide among other things that

"The Supreme Court of this State shall have original jurisdiction of actions brought herein to enjoin the enforcement or collection of any illegal tax, charge or assessment made or levied for any State purpose and to enjoin the collection of any such tax if it shall be found by the Court that the same is illegal . . . ." (3781)

The excise tax which Applicants claim to be illegal, as applied to Osage production, is levied for a "State purpose" in that the money derived therefrom is by the terms of said Act to be expended in defraying the salaries and expenses of the officers and employees of the State of Oklahoma in the administration of the proration laws of the State of Oklahoma. The statutes referred to whereunder this action is brought to this Court seem to require this Court to take jurisdiction when a case falling within their scope is presented to it as any taxpayer affected by an illegal State tax is given the right to file a petition and it is then provided that summons shall be issued by the Clerk of the Supreme Court upon written præcipe filed by the plaintiff (3782).

2

The jurisdiction given by said statutes to this Court to enjoin the enforcement of illegal taxes levied for any State purpose is exclusively in this Court and cannot be exercised by any inferior court of this State; that the only remedy, if any, which a party would have in an inferior State court seeking to contest the validity of said excise tax as applied to Osage production would be to pay such tax under protest and bring suit to recover the same. This would require suits to be brought each month, as such excise tax is to be paid monthly and would result in each party from whom the tax was sought to be collected being required to bring many suits and there are a large number of parties affected by such excise tax. The amount of tax which any taxpayer would be required to pay as the excise tax accrued for one month would be small, and in many instances, the expenses of the litigation would be greater than the amount of the tax.

[fol. 4] 3

Under the statutes above referred to by reason whereof relief is sought in this Court, if this Court finds such excise tax to be illegal as applied to oil produced in Osage County, it is required to enjoin the collection of such tax as applied to Osage oil as to all parties affected, whether they be parties to this suit or not (3787). So that it will be greatly to the convenience of all parties affected by such excise tax, and to the representatives of the State, if this Court will exercise the jurisdiction imposed or attempted to be imposed upon it by said statutes, and in this one action determine so far as the courts of Oklahoma are concerned the validity or invalidity of said tax as applied to oil produced in Osage County.

4

The relief sought by the Applicants herein involves the exercise of a special remedy expressly created in the Supreme Court of Oklahoma, and nowhere else.

5

The question involved in the present case is one which ultimately this Court will be called upon to decide. Should an action be instituted in the District Court to test the validity of said excise tax as applied to Osage oil production, the losing party, whether the Oklahoma Tax Commission or the taxpayer, in all probability, would appeal and the question would ultimately come to this Court for final decision. The procedure through a District Court action would merely operate to delay a final decision by this Court and in the meantime each party desiring to contest the validity of such tax, as so applied, would be put to great and unnecessary expense in bringing the numerous suits necessary to contest the legality of such tax and the State would be put to great expense in defending the same, all of which can be avoided if this Court will take jurisdiction in this case.

[fol. 5] 6

Applicants further show that no controversy whatever over facts will be involved in this action, but there will be merely a question of law for determination.

Applicants move that if permission be granted for the filing of such petition that thereupon a temporary writ of injunction issue as prayed for in such petition.

Edward H. Chandler, James B. Diggs, Joe Dickerson, R. W. Garrett, Wm. H. Zwick, L. G. Owen, Attorneys for Applicants.

[fols. 6 & 7] IN SUPREME COURT OF OKLAHOMA

ORDER GRANTING LEAVE TO FILE PETITION FOR INJUNCTION—November 21, 1933

The Clerk is hereby ordered to enter the following orders:

25,181—Barnsdall Refineries Inc. et al. v. Oklahoma Tax Commission, et al. Application for this court to assume original jurisdiction, sustained. Defendant ordered to file answer brief within 15 days from this date. Plaintiff to file reply brief within 5 days thereafter.

James B. Cullison, Vice Chief Justice.

[fol. 8] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION—Filed Nov. 21, 1933

Come now the plaintiffs above named, and leave of court having been first had and obtained file this their petition against the defendants, and each of them, and for cause of action say that L. R. Crawford and P. C. Spencer were duly appointed Receivers of Producers and Refiners Corporation on May 7, 1932 by the District Court of the United States for the District of Wyoming in the case of Consolidated Oil Corporation, Plaintiff, v. Producers and Refiners Corporation, in Equity No. 2217, and were duly appointed Ancillary Receivers of such corporation by the United States Court for the Northern District of Oklahoma on May 9, 1932, in the case of Consolidated Oil Corpora-

tion, Plaintiffs, v. Producers and Refiners Corporation, in Equity No. 743, and that such Receivers have been duly authorized by said United States District Court for the Northern District of Oklahoma to become parties plaintiffs to this action, and plaintiffs further say

[fol. 9] . 1. Each of the plaintiffs is a corporation duly organized and doing business in the State of Oklahoma under the laws thereof and the Oklahoma Tax Commission is a body or commission created by the laws of the State of Oklahoma having control of and the administration and execution of the tax laws of the State of Oklahoma and the collection of taxes under the hereinafter named Act, and that the defendants, Melvin Cornish, John T. Bailey and W. D. Humphrey are sole members of said Commission and R. B. Connor is the duly elected, qualified and acting Sheriff of Osage County, Oklahoma.

2. The Osage Tribe or Nation of Indians is a dependent tribe of Indians under the tutelage and guardianship of the United States and were so at and before all the times hereinafter named and as a place of residence for such Nation or Tribe of Indians the United States procured title to that body of land known as the Osage Reservation in the State of Oklahoma and which now composes Osage County in the State of Oklahoma, and on June 28, 1906, the United States by Act of Congress provided for the division of the lands and funds belonging to said tribe of Indians among the members of said tribe, said lands and funds to be divided in the manner and by the means in said Act of Congress set out and contained, but excepting from division, allotment or other disposition among the individual members of said tribe the oil, gas and other mineral content in or under said land, and reserving such mineral to the United States in trust for the use and benefit of said tribe, for division among them, or for disposition in such other manner as the United States might determine to be for the best interest of such tribe of Indians and ever since said 28th day of June, 1906, the title to said oil and gas and other mineral in the Osage Nation has been and remains in the United States as aforesaid. And under said Act of Congress and in accordance with its duties as a trustee of said oil, gas and other minerals it became, was and is the duty of the United States to see that said minerals were

produced from said land under rules and regulations prescribed by the Secretary of the Interior and to conserve and safeguard the rights of said tribe of Indians in and to [fol. 10] the said minerals and the proceeds derived from the production thereof until such time as the United States, in pursuance of the terms of said Act of June 28, 1906, and Acts of Congress amendatory thereto, finally disposes of said oil, gas and other minerals. And said Act expressly provides for the leasing of said lands for oil and gas mining purposes and provides that leases for such purposes are to be made by the Osage Tribe of Indians through its tribal council, with the approval of the Secretary of the Interior and under such rules and regulations as he might prescribe, and also provides that the royalties arising from said leases shall be paid and covered into the Treasury of the United States for the use and benefit of said tribe of Indians and when so paid into such Treasury, such royalties remain therein until paid out and disposed of in the manner provided by said Act of June 28, 1906, or to be provided by subsequent Acts amendatory to or taking the place of said Act of June 28, 1906, and under the laws of the United States now existing the mineral interest in the lands formerly composing the Osage Nation are unallotted and undivided and the title thereto remains in trust in the United States and the proceeds from the mineral interest therein are also held in trust by the United States to be disposed of in such manner as is or may be by law prescribed and the production of oil and gas and other minerals from said land under the laws of the United States is in performance of a function of government by the United States on and in behalf of its Indian wards and the lessee producing oil and gas therefrom is an agency or instrumentality of the government of the United States selected by the Government in the discharge of its duty and obligation to such Osage Tribe of Indians to see that the minerals under such land are produced in such manner as best calculated to advance and maintain the interest of said Indians.

3. That no oil is being or can be produced in said Osage County, except pursuant to an oil lease made by the Osage Nation through its Tribal Council, and approved by the Secretary of the Interior as by said Acts of Congress provided and the Rules and Regulations of the Secretary of

the Interior pertaining thereto; that each of said leases and such rules and regulations set out the manner in which oil and gas is to be produced, how the sale and disposal [fol. 11] of oil produced can be had and made, and how and under what conditions the oil produced from said leases can be run and delivered to the purchasers thereof and expressly provide that none of said oil can be sold, run or disposed of without the consent of the Superintendent of the Osage Indian Reservation shown by an Approved Division Order, and that said laws, leases, rules and regulations provide that the royalty reserved in each of said oil leases shall be paid to the Superintendent of such tribe at Pawhuska, Oklahoma, to be covered into the United States Treasury for the use and benefit of such Tribe of Indians or to deliver, at the election of the United States, a certain specified portion of the oil produced. That in the procurement, operation and development of said leases the plaintiffs and others have expended many millions of dollars and are now expending for operations large amounts of money and in all probability will continue to spend large amounts of money in the further development, operation and procurement of oil from said leased premises. That in the operation and development of said leases for oil and gas mining purposes the plaintiffs and each of them is acting as an agency or instrumentality of the United States in the discharge of the duty of the United States as to the production of oil in the interest and to the benefit of its said wards and as such is not subject to any control by the State of Oklahoma or any of the officers thereof and that said State and the officers thereof are without power, authority or warrant of law to exact a fee or tax by whatever name known or called on the privilege of the plaintiffs of producing or operating said leases or to levy or assess a tax on the production of oil from said leases as and when produced until and unless such oil becomes a part of the general property in the State of Oklahoma, except insofar as said tax may be authorized by an Act of Congress of the United States and the Congress of the United States, by the Act of March 3, 1921, expressly authorized the State of Oklahoma to levy and collect a gross production tax upon all oil and gas produced in said Osage Nation, such taxes to be in lieu of all other state and county taxes levied upon the production of oil and gas and each of the

plaintiffs subject to pay such gross production tax, in compliance with said provisions of such last Act, has since the [fol. 12] date of its approval, paid to the proper officers of the State of Oklahoma the gross production tax levied on the production of oil in Osage County and by reason thereof the State of Oklahoma is prohibited from levying other taxes upon such oil production of the plaintiffs. Such of the plaintiffs as own leases upon lands in Osage County, in procuring the same, procured and paid for them with the knowledge that the same, and the production of oil therefrom, was free from taxation by the State of Oklahoma except as in the manner hereinabove set out and by reason of said freedom from taxation they were induced to and did pay a greater amount for the acquisition of such leases than they would otherwise have done.

4. That each of the plaintiffs is affected by the Excise Tax Act on oil hereinafter referred to as applied to oil produced in Osage County; that each plaintiff is a producer of oil under one or more of said Osage oil leases, or a purchaser of oil produced in Osage County, or both a producer and purchaser of such oil; that the Oklahoma Legislature in 1933 passed an Act levying an excise tax on all petroleum produced in the State of Oklahoma, which Act was approved by the Governor of Oklahoma on the 10th day of April, 1933, and became in force and effect immediately after the approval thereof. By the terms of said Act, until June 30, 1935, there is levied an excise tax of 1/8 of 1¢ per barrel on each and every barrel of petroleum produced in the State of Oklahoma after the said 10th day of April, 1933, and such Act provides that said tax shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as provided by Chapter 66, Article 5 of the Session Laws of 1931 for the collection of the gross production tax on petroleum oil, and provides where such petroleum is sold at the time of production such excise tax shall be paid by the purchaser who is by said Act authorized to deduct in making settlement for such tax with the producer of said oil and the royalty owner of said oil, the amount of the tax so paid, and no provision is contained in said Act which exempts from its operation or from the tax therein levied and imposed, oil produced in the Osage Nation by persons acting as agencies of the United States

and as its instrumentalities in the production of said oil [fol. 13] for the use and benefit of said tribe, and where said oil is not sold at the time of its production but is retained by the producer, then it is provided that such excise tax shall be paid by the producer who, in turn, is authorized to deduct the pro rata amount of said tax in his settlements with the royalty owners for said oil and, where said oil is not sold, to deduct from the royalty oil an amount of royalty oil equivalent in value to the pro rata amount of the tax at the time the tax became due and paid. That said Act further provides that the tax thereby levied and imposed shall become payable on the 1st day of each calendar month on all petroleum oil produced in the State of Oklahoma during the preceding monthly period and if the tax is not paid on or before the end of the month the same becomes payable, the tax becomes delinquent and from such time, as a penalty, bears interest at the rate of 18 per cent per annum and it is provided in said Act that when any such tax is not paid the Oklahoma Tax Commission shall issue its warrant, directed to the Sheriff of any county in which the producer or purchaser has property, for the collection of the amount of said tax, interest and penalty, and the sheriff by such warrant is directed to proceed to levy upon the property, assets and effects of any such person (purchasing or producing oil and required to pay the tax so assessed and failing so to do), and to sell the same and make return thereof as upon execution, and such tax, interest and penalty under said Act constitutes and remains a lien upon the property, assets, and effects of such producer or purchaser required to pay the tax, until the same is paid. And in said Act it is further provided that if such producer or purchaser of oil, subject to such tax, fails to make report of the production and purchase or production without sale, or the computation of the tax levied by said Act within the time prescribed in such report, it is made the duty of the Oklahoma Tax Commission to examine the books, records and files of such purchaser or producer to ascertain the amount of oil produced or sold, or either, and to compute the taxes thereon, to which shall be added, when computed, the cost of such examination, together with any and all penalties accrued thereon. And it is further provided that any producer or purchaser who fails to file any sworn statement or report required by the provisions of

the Act in the manner and in the time in said Act pre-
[fol. 14] scribed, shall be liable to the penalty of $500.00 for each day of failure so to do, and such penalty is declared to be a lien upon all the property and assets of such producer or purchaser located in the State of Oklahoma. The plaintiffs and each of them have duly and regularly reported to the Oklahoma Tax Commission on account of all the oil produced or purchased where such substances were subject to the laws of the State of Oklahoma and has included in said report the amount of oil produced by them from leases in the Osage Nation and paid the amount of tax due under said Act, except plaintiffs have failed and refused, and now fail and refuse, to pay said tax so levied and imposed by said Act on the oil produced in the Osage Nation, and thereby have become, if said Act is valid as to oil produced in Osage County, subject to the penalty of 18 per cent as interest and, by reason of the failure in this regard to comply with the provisions of said Act have become apparently subject to such tax and penalty and therefore the State of Oklahoma is entitled to collect under the provisions of said Act, if the same be valid, said excise tax, with interest thereon at the rate of 18 per cent per annum until paid, and, if said Act is held to be valid as applied to the production of oil from leases in the Osage Nation, it constitutes a lien against all the property of any plaintiff failing to pay the tax, wherever the same may be located in the State of Oklahoma, and which lien can be enforced by the issuance of a tax warrant to the Sheriff of any County in the State of Oklahoma in which such plaintiff has any property, commanding such Sheriff to levy the same on the property of such plaintiff and proceed to sell the same in accordance with the terms of said Act which have been hereinbefore set out. The Oklahoma Tax Commission and the members thereof, being the body vested by said Act with the authority to enforce the same, construe and interpret said Act as valid as applied to the production of oil from leases in the Osage Nation and hold that said production is subject to the tax levied by said Act and must be paid in order to avoid the interest and penalties imposed by said Act and to relieve the property of plaintiffs from the liens declared and established thereon by such Act, and as so construed plaintiffs say that said Act is wholly void and of no force and effect in that, as so

[fol. 15] applied, it is in violation of the Constitution and laws of the United States in that it seeks to tax an agency or instrumentality of the Federal Government in the discharge of its official and trust duties to said Osage Tribe of Indians and attempts to levy a tax on the production of oil, the title of which is in the United States in trust as aforesaid, in violation of the express provision of the said Act of March 3, 1921, and that applying said Act to the oil produced in the Osage Nation, and in collecting said excise tax on the oil produced therefrom, the said Tax Commission and the other officers charged with the execution of said statute will be taking plaintiffs' property and depriving them thereof without due process of law and such taking will be a confiscation of the property of plaintiff for the use and benefit of the State of Oklahoma without compensation and without due process of law and therefore is and will be in violation of the Fourteenth Amendment to the Constitution of the United States. And said Tax Commission in so applying said Act to production and purchases of oil produced from oil leases in the Osage Nation is attempting to enforce as against plaintiffs, said Act, together with the penalties that may accrue by reason of non-compliance with the provisions of said Act and on the failure and refusal of plaintiffs to pay said excise tax on the ground and for the reasons hereinbefore set out, the Oklahoma Tax Commission has issued tax warrants against several of the plaintiffs directed to the defendant, R. B. Connor, as Sheriff of Osage County, Oklahoma, directing such Sheriff to proceed to collect said excise tax, interest, penalties and costs by levying the same on any property, goods or effects of such plaintiffs and the said Sheriff threatens to and will levy said warrants on the property of such plaintiffs in Osage County, Oklahoma, and proceed to sell the same in accordance with the mandates of said warrants and remit the proceeds of such property to the Oklahoma Tax Commission in satisfaction of said illegal tax, penalties, costs and expenses, unless restrained by the orders of this Honorable Court from so doing. And unless the property to be seized and sold, on sale produces an amount sufficient to pay the amount of any such warrant, the Oklahoma Tax Commission will issue alias warrants for the collection of such tax, interest, penalties, and costs, [fol. 16] until the same is collected. And will continue to

issue like tax warrants directed to the Sheriff of Osage County, or to the sheriffs of other counties in the State of Oklahoma in which plaintiffs have property, for the collection of such tax, interest and penalties at each succeeding time under said Act imposing such tax, the tax thereby imposed is payable. And said Tax Commission, as plaintiffs are informed and believe, and therefore state the fact to be, will, even if plaintiffs pay such tax under protest and bring suits to recover the same (which plaintiffs do not believe they have the right to do), not await the final determination of such suits before issuing other tax warrants for the collection of such tax, but will, notwithstanding the pendency of any suit, proceed at the expiration of every monthly payment period prescribed in said Act to issue tax warrants and plaintiffs will, if not given relief here, be subject to the annoyance, inconvenience and expense of a multiplicity of suits for the purpose of having said tax declared void and its exaction unlawful, and said Oklahoma Tax Commission will proceed to issue such succeeding tax warrants as hereinabove stated unless prohibited by the order of this Honorable Court from so doing. On the issuance of the tax warrants to R. B. Connor, as Sheriff of Osage County, Oklahoma, as hereinbefore stated, and on the issue of each succeeding warrant for the collection of the excise tax imposed by said Act, such warrant becomes and is an apparent lien on all the property in the State of Oklahoma of the plaintiff against whom the warrant is issued and casts an apparent cloud upon the title of all of such plaintiff's property which depreciates and impairs its value, the title thereto, and the enjoyment, use and disposition thereof and unless the defendants herein are enjoined and restrained from executing the tax warrants already issued and from issuing subsequent tax warrants plaintiffs will suffer irreparable damage and injury, will be powerless to protect themselves against recurrent acts of the defendants seeking to collect such excise tax, and for the redress of such wrongs and injuries and for the establishment of its right to produce oil in the Osage Nation, free from the taxing power of the State of Oklahoma except as authorized by Congress, plaintiffs are without any adequate remedy in the courts of Oklahoma, except that sought in this action.

[fol. 17] 5. Said Act of April 10, 1933, does not provide

any remedy by which the tax required to be paid by plaintiffs on their said production in the Osage Nation can be paid under protest and recovered if such tax should be declared illegal, nor does Chapter 66, Article 5 of the Session Laws of 1931, referred to in said Act of April 10, 1933, furnish any remedy or action by which the legality or illegality of said tax, when attempted to be levied on oil produced from the Osage leases, can be tested and determined and the tax, if paid under protest, recovered, and the general laws of the State of Oklahoma in regard to the payment of taxes under protest and the recovery thereof furnish complainant no speedy and adequate remedy at law in that such law does not apply to the tax herein sought to be enjoined and even if complainant be adjudged to have a remedy under said general law, such law is wholly inadequate to give complainant a speedy and adequate remedy, for, under the provisions of such law, the illegality of the tax can only be tested by the payment of the tax and bringing a suit for the recovery thereof where the illegality of the tax is alleged to arise by reason of some action for which the law provides no appeal and the illegality of the tax imposed by said Act and sought to be enforced does not arise or spring from, nor is it connected with the fact that no appeal is allowed from the imposition, enforcement or collection of said tax, but the illegality of such tax is founded on the fact of the want of competence of the State of Oklahoma to levy said tax and the provisions of said general taxing law are expressly limited to the taxes therein set out and so cannot apply to the tax attempted to be levied by the Act of April 10, 1933, but if such general taxing law does extend to and cover said excise tax, the remedy provided by said law is wholly insufficient and inadequate in this, that it wholly fails to provide for the recovery of any interest on the amount of said tax pending the litigation and does not provide what shall be done with the tax deposited under the terms thereof after the determination of the suit brought for the recovery of the tax, but said law merely provides that the auditor shall retain the tax paid under protest, and for the recovery of which a suit is authorized, as a special deposit to await the final determination of such suit, but fails to provide whether the [fol. 18] State Auditor upon the termination of said suit shall pay the deposit to the aggrieved taxpayer, and does

not provide, in event of the failure of such payment, whether suit to enforce the payment thereof shall or can be brought against the State Auditor or person holding said special deposit, one or both, and it does not provide what the State Auditor shall do with the tax in event he goes out of office, pending the final result of such litigation, nor does it provide how said deposit shall be handled in event the State Auditor receiving said tax and holding the same as a special deposit, should die, or be removed from his office, pending the final determination of the litigation in regard thereto, and does not provide whether said tax shall be held as a special deposit in the custody of the State Auditor or whether the same shall be deposited and held as a special deposit in a bank or whether the same shall be deposited in the State Treasury, and there is no provision as above stated in said general tax law for the payment of interest on the tax so illegally exacted, nor any means by which the money paid under protest in discharge of said tax can be lent or employed so as to produce money from which said interest could be paid.

6. In accordance with requirements of the Enabling Act, the State of Oklahoma by Section 3, of Article 1, of its Constitution, in said Constitution agreed and declared that the people inhabiting said State disclaimed all and any right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian Tribe or Nation, and that until the title to any such public land shall have been extinguished by the United States, the same shall remain subject to the jurisdiction, disposal, and control of the United States. And by reason of such provision of the Constitution, the State of Oklahoma and its Legislature were without jurisdiction, power or authority to pass any Act, and especially said Act of April 10, 1933, imposing and levying the tax hereinabove mentioned on the production of oil, insofar as said Act attempts to levy said tax on the oil produced in the Osage Nation and the attempt of the Oklahoma Tax Commission and the members thereof to enforce the provisions of said Act in collecting or attempt-
[fol. 19] ing to collect the tax levied thereby on production of oil in the Osage Nation, while constituting an apparent lien on the property of plaintiffs, such Acts are wholly without force and effect and are void both under the Con-

stitution of the State of Oklahoma and under the laws and Constitution of the United States. And plaintiffs, in regard to the attempted levy and enforcement of such tax upon them and their property, hereby offer to do equity and to do and perform any act or acts, which it is finally determined they should do and perform.

7. That the Act of April 10, 1933, levies a tax for a State purpose in that said tax is levied and appropriated to the expense of the administration of the proration laws of the State of Oklahoma and is to be collected by, paid to and paid out by the officers of the State of Oklahoma in the discharge of the official duties under the laws of the State of Oklahoma, and is to constitute compensation of officers for the discharge of official duties under the laws of the State of Oklahoma, and said Act of April 10, 1933, imposes an illegal tax, charge and assessment levied for State purposes insofar as the same is sought to be applied to leases in the Osage Nation, now Osage County, Oklahoma, and that therefore this Court has original jurisdiction of this action to enjoin the enforcement of said Act insofar as the same applies to oil produced from such leases and to enjoin the collection of such tax as levied and sought to be collected upon Osage leases. That there are a large number of persons other than these plaintiffs who are affected by the attempted enforcement of said Act as to Osage oil leases; that the said Tax Commission and the members thereof, and the Sheriff of Osage County are officers charged with the duty under said Act of April 10, 1933, of enforcing and collecting the tax levied thereby.

Wherefore, plaintiffs pray that a temporary injunction prohibiting and restraining the Oklahoma Tax Commission, Melvin Cornish, John T. Bailey, and W. D. Humphrey, as members thereof, from enforcing or trying to enforce against these plaintiffs any of the provisions of the said Oklahoma Excise Tax Law so as to interfere with the right of plaintiffs to produce oil from their oil leases in the Osage Nation without being liable to the tax levied by said Act on the production of such oil and be prohibited and [fol. 20] restrained from requiring or attempting to require plaintiffs to make any report under said Excise Tax law of their production of oil in the Osage Nation or to report and pay the tax attempted to be levied by said Act

and be further prohibited and restrained from assessing or attempting to assess against plaintiffs any of the interest, penalties, or costs provided in said Act for failure to make the reports or to pay the tax required thereby insofar as such failure to make such reports and pay such tax is confined to production from oil leases in the Osage Nation, and that the said Oklahoma Tax Commission, Melvin Cornish, John T. Bailey and W. D. Humphrey, as members thereof, be further restrained, prohibited and enjoined from issuing or attempting to issue tax warrants to the Sheriff of any County in the State of Oklahoma in which plaintiffs have property, commanding such Sheriff to collect or, failing to collect, to levy tax warrants on the property of plaintiffs in order to collect such tax, insofar as the tax levied by said Act is sought to be applied to the production of oil on and from oil leases in the Osage Nation, and that the defendant, R. B. Connor, as Sheriff of Osage County, be prohibited and enjoined from levying or attempting to levy the tax warrants heretofore issued by said Tax Commission to him as said Sheriff for the collection of said Excise Tax on the production from oil leases in Osage Nation and from taking possession of or attempting to take possession of any of the property of any of the plaintiffs under said tax warrants or attempting to enforce or execute said tax warrants in any manner or form against any of the plaintiffs or the property of any of the plaintiffs and that said temporary injunction remain and be in force until the final hearing and disposition of this cause unless the same be sooner set aside, changed and modified by the orders of this Court and on the final hearing hereof said temporary injunction be made final and permanently prohibit and restrain the Oklahoma Tax Commission, and the above named members thereof, from enforcing or attempting to enforce any of the provisions of the Oklahoma Excise Tax Law as against these plaintiffs as said law is applied or attempted to be applied to the production of oil from leases upon lands in the Osage Nation so long as the consent of the United States to the levy of said tax by the State of Oklahoma is not given and that said statute, inso-
[fol. 21] far as the same is construed and interpreted as applying to the production of oil from oil leases in the Osage Nation, to be declared, adjudged and decreed, void and of no force and effect and the said defendant R. B.

Connor, be enjoined and restrained from executing or attempting to execute any tax warrant now or hereafter to be issued by the said Oklahoma Tax Commission and directed to him as Sheriff of Osage County to collect such Excise Tax attempted to be levied on oil produced from the Osage Nation unless the said United States shall have given its consent to the imposition of such Excise Tax.

Plaintiffs further pray that on the final hearing of this cause that said Act of April 10, 1933, be declared void and of no force and effect insofar as the same applies to, or is attempted to be applied to, oil producing leases in the Osage Nation and that on the final hearing hereof that said Tax Commission, the members thereof, and its successors in office, and the said R. B. Connor, as Sheriff of Osage County, and his successors in office, be forever enjoined from enforcing or attempting to enforce said Act, or issuing or attempting to issue and from executing or attempting to execute any tax warrants, for the collection of the tax imposed by said Act insofar as oil produced in the Osage Nation is concerned, until and unless the consent of the United States to the imposition of said tax has been given by Act of Congress.

Plaintiffs further pray that all other parties similarly situated as plaintiffs may come in and become parties hereto on making application to the Court so to do.

Plaintiffs further pray for such other, further or more general relief which the Court in equity and good conscience may deem they are entitled to.

James B. Diggs, Joe Dickerson, R. W. Garrett, Wm. H. Zwick, L. G. Owen, Attorneys for Plaintiffs.

[fol. 22] *Duly sworn to by L. G. Owen, Jurat omitted in printing.*

[fol. 23] IN SUPREME COURT OF OKLAHOMA

[Title omitted]

MOTION FOR ORDER CORRECTING TITLE OF DEFENDANTS' ANSWER—Filed April 29, 1935

Come now the defendants in the above entitled and numbered cause and show the Court that heretofore, towit, on

the 21st day of November, 1933, an order was entered in said cause assuming original jurisdiction on the plaintiffs' petition and directing the defendants to file brief in response thereto. Defendants in compliance with the order of the Court filed their answer and brief to plaintiffs' petition and brief, but the pleading was inadvertently styled "Answer Brief of Defendants" and it should have been styled "Answer to Plaintiffs' Petition and Brief." The pleading was treated by the Court and the plaintiffs and defendants as an answer to plaintiffs' petition and brief.

The defendants, therefore, move the Court to reform and correct the said pleading, in the matter of its title, to read "Answer to plaintiffs' petition and Brief."

C. D. Cund, C. W. King, A. L. Herr, Attorneys for Oklahoma Tax Commission.

Copies hereof mailed to opposing counsel, L. G. Owen, Tulsa, Okla., M. D. Kirk, Tulsa, Okla.

[fols. 24 & 25] [File endorsement omitted.]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER CORRECTING TITLE OF DEFENDANTS' ANSWER—Filed April 29, 1935

Application having been made to reform the title of pleading filed in the above case entitled "Answer Brief of Defendants" to read "Answer to Plaintiffs' Petition and Brief", permission to reform and correct such pleading is hereby granted and, it is ordered that defendants' pleading be considered as if the title so read.

Edwin R. McNeill, Chief Justice.

[fol. 26] [File endorsement omitted.]

[Title omitted]

ANSWER BRIEF OF DEFENDANTS—Filed Jan. 8, 1934

Plaintiffs by their petition in this court seek to prohibit the Oklahoma Tax Commission and the Sheriff of Osage

County, Oklahoma, from collecting the one-eighth of one cent per barrel tax levied upon the production of oil and gas in this State insofar as it applies to the production thereof on Osage Indian lands. The tax is levied by sec. 1, c. 132, S. L. 1933, page 302, which provides:

"Until June 30, 1935, there is hereby levied an excise tax of one-eighth of one cent per barrel on each and every barrel of petroleum oil produced in the State of Oklahoma after the passage and approval of this act. Such excise tax of one-eighth of one cent per barrel shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as is now provided by Chapter 66, Article 5 of the Oklahoma Session Laws of 1931, for the collection of gross production tax on petroleum oil. On petroleum oil sold at the time of production, the excise tax thereon shall be paid by the purchaser, who is hereby authorized to deduct, in making settlement with the producer and/or royalty owner, the amount of tax so paid; [fol. 27] provided that in the event oil on which such tax becomes due is not sold at the time of production, but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself, including the tax due on royalty oil not sold; provided further, that in settlement with the royalty owner, such producer shall have the right to deduct the amount of tax so paid on royalty oil, or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of tax paid."

The purpose for which the tax is levied is set forth in sec. 2 of the Act, which provides:

"All funds derived from the levy of the tax of one-eighth of one cent per barrel on petroleum oli produced in the State of Oklahoma shall be deposited in the State Treasury to the credit of a separate and distinct fund to be known as the 'Proration Fund.' All moneys in said fund are hereby appropriated, and shall be used, for the payment of salaries and expenses, including premiums on surety bonds as are required by law, of the Proration Umpire, Assistant Attorneys, reporters, stenographers and clerks, and all items of office expense and office supplies, including stationery, telegraph and telephone, postage and printing, and all other items of expense, as fixed and authorized by the provisions of House Bill No. 481, of the Acts

of the Fourteenth Session of the Legislature of the State of Oklahoma, but no salary, and no expense account of either of such officials or employees herein named, and no item of expense for office supplies or other items of office expense, shall be allowed until the same has been itemized and verified by claimant, and approved by the Proration Umpire, and, when so approved, the State Auditor shall draw his warrants therefor upon the State Treasury, and the same shall be paid out of the 'Proration Fund' hereby created."

Plaintiffs contend that the tax imposed by the Act is an excise tax, and is a tax upon a governmental instrumentality and not permitted by the Act of March 3, 1921, 41 Stats. at L. 1250. Sec. 5 of the Act provides:

[fol. 28] "That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and distributed, and in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per centum levied as gross production tax, to be distributed as provided by the laws of Oklahoma: Provided, That the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein: Provided further, That the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only."

It is our contention that the tax levied by the State under the provisions of the Act above mentioned is an additional gross production tax, and is, therefore, authorized by the

Act of Congress above quoted. It will be noticed that the Act of Congress provides that the State of Oklahoma is authorized from and after the passage thereof to levy and collect a gross production tax on all oil and gas produced in Osage County, Oklahoma. The amount of the tax authorized to be levied thereunder is not limited. The only limitation or qualification provided by the Act is that "all taxes so collected shall be paid and distributed, and shall be in lieu of all other State and county taxes levied upon the production of oil or gas as provided by the laws of Oklahoma". The tax levied is a gross production tax, and the Act of the Legislature authorizing the same is, therefore, permitted by the Act of Congress above quoted.

The mere fact that the Legislature in adopting the Act [fol.29] designated the tax in question an excise tax is not controlling. In determining the nature of the tax, the courts look to the intention and purpose of the Legislature in enacting the law levying the tax, and upon the practical effect and operation of the tax so imposed. In the case of St. Louis, Southern R. Co. v. State of Arkansas, 235 U. S. 350, the Court said:

"In determining the nature of a state tax and constitutionality of the statute imposing it, this court must regard substance rather than form and the controlling test is found in the operation and effect of the statute as applied and enforced."

In the case of Shaffer v. Carter, State Auditor, 252 U. S. 37, the Court in discussing the question here involved, said:

"It is insisted, however, both by appellant in this case and by the opponents of the New York law in Travis v. Yale & Towne Mfg. Co., that an income tax is in its nature a personal tax, or a 'subjective tax imposing personal liability upon the recipient of the income;' and that as to a non-resident the State has no jurisdiction to impose such a liability. This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical opera-

tion and effect of the tax imposed. St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350, 362; Mountain Timber Co. v. Washington, 243 U. S. 219, 237; Crew Levick Co. v. Pennsylvania, 245 U. S. 292, 294; American Mfg. Co. v. St. Louis, 250 U. S. 459, 463."

[fol. 30] The tax in question was levied for the purpose of raising funds to enforce the proration law relating to petroleum and natural gas produced in this State, which law was enacted to prevent waste, and to protect the oil industry of the State, and was enacted for the benefit of plaintiffs as well as other companies producing oil and gas in the State. No ad valorem tax is levied against the property of plaintiffs, and the tax of one-eighth of one cent levied by the Act for the purpose of paying the expenses incident to the enforcement of the proration law together with the three per cent theretofore levied under General Law, sec. 12434, O. S. 1931, must be taken into consideration and construed together as a single Act levying a gross production tax which is in lieu of ad valorem taxes upon such production. The tax in question is not an excise tax, but is, in truth and in fact, a tax in the nature and in lieu of a property tax.

It will be observed that the Act levying the tax in question provides that the tax so levied shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as is now provided by law for the collection of gross production tax on petroleum oil, and if the Legislature in enacting the law had designated the tax a gross production tax instead of an excise tax, in our opinion it would not then have been contended that the Act was invalid and not authorized by the Act of Congress above mentioned. The mere fact, however, that the tax in question is designated an excise tax by the Legislature can not change the effect of the tax or the purpose for which the law was enacted, and the tax levied. The Court should construe the Act in question as levying a gross production [fols. 31 & 32] tax. The writ should be denied.

Respectfully submitted. J. Berry King, Attorney General, by F. M. Dudley, Assistant Attorney General; C. W. King, Attorney for Oklahoma Tax Commission; A. L. Herr, Attorney for Defendants.

[fol. 33] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 25,181

BARNSDALL REFINERIES, INC. et al., Plaintiffs in Error,

vs.

OKLAHOMA TAX COMMISSION, MELVIN CORNISH, JOHN T. BAILEY, and W. D. HUMPHREY, as Chairman and Members of said Commission, and R. B. CONNOR, as Sheriff of Osage County, Oklahoma, Defendants in Error.

SYLLABUS

1. The excise tax of one-eighth of one cent per barrel on oil levied by Chapter 132, S. L. 1933, when applied to oil produced from lands of the Osage Indian Tribe in Osage county, Oklahoma, by lessees operating under leases executed by and with the approval of the Secretary of the Interior of the United States, is an unauthorized State tax on a Federal governmental agency or instrumentality, and is beyond the authority of the State.

Original action to enjoin the Oklahoma Tax Commission and the Sheriff of Osage County from collecting an excise tax of one-eighth of one cent per barrel on oil produced from lands of the Osage Tribe of Indians.

Injunction granted.

James B. Diggs, Joe Dickerson, R. W. Garrett, Wm. H. Zwick, L. G. Owen, Attorneys for Plaintiffs; C. W. King, A. L. Herr, Attorneys for Defendants.

[fol. 34] OPINION—Filed Feb. 19, 1935

WELCH, J.: The plaintiffs, holding governmental leases properly executed by and with the approval of the Secretary of the Interior of the United States, are producing crude oil from the lands of the Osage Tribe of Indians in Osage County, Oklahoma. They seek to enjoin collection of the tax sought to be collected on such oil pursuant to the provisions of Chapter 132, S. L. 1933. The contention of the plaintiffs is that the leases held by them are instrumentalities employed by the United States Government for the

development and use of Osage lands for the benefit of the Osage Tribe of Indians, and are governmental agencies or instrumentalities; that no tax thereon may be imposed by the State of Oklahoma without the consent of the United States Government; that the tax in question is an excise tax; that no consent has been given by the United States Government to the levy and collection of such tax; and that therefore such tax may not be levied and collected on such oil produced from Osage lands.

The defendants maintain that the tax in question is an additional gross production tax, and is therefore authorized by the Act of Congress of March 3, 1921, 41 Stats. at Large, 1250, which Act authorizes the State of Oklahoma to levy and collect a gross production tax on oil and gas produced in Osage County, Oklahoma.

It is now beyond question that the oil leases held by the plaintiffs are governmental instrumentalities, and that the State of Oklahoma may not impose any tax thereon without the consent of the United States Government. Carter Oil Company v. Oklahoma Tax Commission 166 Okla. 1, 25 Pac. (2d) 1092; Choctaw O. & G. R. Co. v. Harrison, 235 U. S. 292, 59 L. ed. 234; Indian Territory Illuminating Oil Co. v. Oklahoma, 240 U. S. 522, 60 L. ed. 779; Howard v. Oil Companies, 247 U. S. 503, 62 L. ed. 1239; Large Oil Co. v. Howard, 248 U. S. 549, 63 L. ed. 416; Gillispie v. Oklahoma, 257 U. S. 501, 66 L. ed. 338; Jaybird Mining Co. v. Weir, 271 U. S. 609, 70 L. ed. 1112. And it seems to [fol. 35] be conceded by the defendants that this tax could not be levied and collected without the consent of the United States Government.

In 1916 the State Legislature adopted the gross production tax law carried forward as section 12,434, O. S. 1931, providing in substance for the collection of a gross production tax equal to three percentum of the gross value of the production of oil and gas, with provision in the act (Sec. 12445 O. S. 1931) for the expenditure of the funds realized from that tax for current expenses of the State Government, in aid of common schools of the county where the oil and gas is produced, and in aid of the construction of permanent roads and bridges of the county where the oil and gas is produced.

It was then held by the courts (see above authorities) that this tax could not be collected on oil produced from

the Osage Indian lands for lack of consent thereto on the part of the United States Government.

Thereafter, on March 3, 1921, the Congress adopted a permissive Act (41 Stats. at Large, 1250) providing as follows:

"Sec. 5. That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalities from production of oil and gas, the per centum levied as gross production tax, to be distributed as provided by the laws of Oklahoma; Provided, That the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein: Provided further, That the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only."

Since that Act of Congress became effective the State has collected upon oil produced in Osage County, Oklahoma, the gross production tax provided for in section 12434, O. S. 1931.

In 1933 the State Legislature adopted House Bill #481, Chapter 131, S. L. 1933, referred to as the "Proration Law" and having for its purpose the prevention of waste of crude petroleum and natural gas, and providing in partial substance that whenever the full production of any common source of supply of oil in this state can only be obtained under conditions constituting waste, then any [fol. 36] person having the right to drill into and produce oil from any such common source of supply should only take

therefrom such proportion, or his proper portion of the oil, that may be produced therefrom without waste. This act created the official machinery for its enforcement, and provided for the appointment of various salaried officials, and authorized the expense incident to the many details of the enforcement of the law in these regards. The same Legislature adopted House Bill No. 483, Chapter 132, O. S. 1931, entitled "An Act levying an Excise Tax of ⅛th of 1 per cent per barrel on petroleum oil produced in the State of Oklahoma, subsequent to the passage and approval of this act," and the body of the Act levied such an excise tax, and provided for its collection, and provided in substance that the funds derived from the levy and collection of that tax should be deposited in the State Treasury to the credit of a special and distinct fund to be known as "The Proration Fund," and to be expended for salaries, supplies and expenses as fixed and authorized by the provisions of House Bill #481, the "Proration Law" above referred to.

Under the provisions of this Act this tax is levied only for the period of time from the effective date of the Act in 1933, to June 30, 1935. It is that tax of ⅛th of one cent per barrel on oil that is here under consideration.

In considering this cause, and at the outset, we are met with the question whether this tax of ⅛th of one cent per barrel is or is not an "Excise Tax." It was denominated an "Excise Tax" by the Legislature in the body of the Act levying the tax, and in the title thereto, and while the designation of a tax is not necessarily controlling as to what is the nature and character of the tax, yet this tax is not in any manner based upon the value of the oil taxed, applying alike to the most valuable barrel of oil as to the least valuable barrel. This tax is small in amount, and to exist for a limited time only, and for the benefit of a special fund or purpose as distinguished from a general purpose. It therefore bears all the earmarks of an excise tax as distinguished from a property tax, and we conclude that it is in truth and in fact what the Legislature designated it to be, that is, an "Excise Tax." Patton v. Brady, 184 U. S. 608, 46 Law ed. 713; Flint v. Stone Tracy Co. 220 U. S. 107, 55 Law. ed. 389.

[fol. 37] But it is the contention of the defendants that whether this tax is determined to be an excise tax or not,

that it is levied upon the gross production of oil, and is but an additional gross production tax, and within the permissive Act of Congress above referred to.

Having concluded that this tax is an excise tax, and it not being contended that there is any specific consent to the levy and collection of an excise tax, we must determine whether this tax is consented to by the Act of Congress of March 3rd, 1921, consenting to the levy and collection of a state gross production tax.

Since the adoption of the legislative act of 1916, the three per centum tax thereunder levied and collected has been commonly known and referred to as the "gross production tax." That act provides specifically that the tax therein levied shall and should be "in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts, and other municipalities, upon any property rights attached to or inherent in the right to said minerals, leases, etc." That act also provided that the funds collected should be distributed and expended for the three purposes heretofore stated.

This one-eighth of one cent tax is levied on each barrel of oil without regard to the value of the oil taxed. It is not a per centum tax as is the gross production tax. The money collected for gross production tax is distributed two-thirds for current expense of state government, and the remaining one-third is distributed one-half to the common schools of the county where the oil is produced, and one-half in aid of the construction of permanent roads and bridges of the county where the oil is produced, while the money collected for the one-eighth of one cent excise tax is not distributed in general over the state, nor is any of it restricted to or required to be expended in the county where the oil is produced, but on the contrary, this money goes into the "proration fund" and is used to pay expenses of maintaining and enforcing proration only in and for those pools or common sources of supply of oil where the conditions are such that the full production of oil from that common source of supply cannot be taken without constituting waste. Considering the differences in the method of levying of the gross production tax and the excise tax here under consideration, and the different method of dis-
[fol. 38] tribution of the gross production tax collections and the excise tax collections, Congress might well have consented to the imposition of the gross production tax in

the language above quoted from the Congressional Act, without having any inclination or intention of consenting to the imposition of such a tax as the excise tax here under consideration. As regards the matters hereunder consideration, the duty, purpose and policy of the United States Government was to look after and provide for the general well being of the Osage Indians, and provide for the care and protection of their property. The Congress might well have observed and considered the benefits that would be received by the Osage Indians in Osage County, Oklahoma, by the collection of the gross production tax and the expenditure thereof in the method and for the three purposes provided in that act. The same federal authority might not observe such benefits as would justify the government in consenting to this excise tax on the oil produced from the Osage Indian lands. This proration fund may or may not be expended in Osage county. There may be but few common sources of supply in Oklahoma to which the proration law would apply, in which event all collections of this excise tax would be used in the enforcement of the proration law in and for those pools or sources of supply which come within the provisions of the proration law. Such pools or sources of supply may of course decrease in number and may be far removed from the Osage Indian lands. The enforcement of this act, however beneficial to those common sources of supply where it is applicable, and however beneficial indirectly in and to other oil fields, might or might not in the opinion of governmental authorities be beneficial to the wards of the government, the Osage Indians. The Congress might or might not consent to the levy and collection of this excise tax.

Congress might have withheld consent to the levy and collection of any state tax on these government instrumentalities. The State of Oklahoma thus far has withheld consent to the collection of federal taxes on similar state instrumentalities, and the objections to such federal taxes as constituting burdens on state instrumentalities has been sustained. Burnett v. Coronada Oil & Gas Co. 285 U. S. 393, 76 Law ed. 815.

[fol. 39] Our state should freely act in the levy and collection of a tax on national governmental instrumentalities, which is consented to by the National Government, but we should be slow to presume upon consent given, and careful to remain within the limits of the acquiescence or the

consent heretofore given, and we should not create or presume the right to levy and collect one tax because the National Government has consented to the levy and collection of another and a different tax. Under the permissive Act of Congress we have levied and collected the gross production tax which was authorized and permitted, and further than that we cannot go with other taxes until and unless that government should itself extend the consent and permission heretofore granted. That governmental consent cannot be extended or enlarged upon by the State Legislature, and should not be by this court.

We conclude that the tax of one-eighth of one cent per barrel levied by Chapter 132, S. L. 1933, is an excise tax and not an additional gross production tax; that this excise tax is levied upon governmental agencies when it is sought to be applied to oil produced from the lands of the Osage Indian Tribe under the leases held by the plaintiff; that it cannot be so applied without the consent of the National Government, and that this consent has not been given. It therefore follows that such collection of this tax must be enjoined, and in keeping with the prayer of the plaintiffs' petition the defendant, The Oklahoma Tax Commission, and Melvin Cornish, John T. Bailey and W. D. Humphrey, as Chairman and Members of said Commission, and R. B. Connor, as Sheriff of Osage County, Oklahoma, are hereby enjoined from collecting this excise tax of one-eighth of one cent per barrel on any and all oil produced from the lands of the Osage Tribe of Indians situate in Osage County, Oklahoma, until and unless the consent of the United States Government for the imposition of such tax shall be given.

McNeill, C. J., and Bayless, Phelps and Gibson, JJ., concur.

Osborn, V. C. J., and Riley, Busby and Corn, JJ., dissent.

[fol. 40] [File endorsement omitted.]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

ORDER CORRECTING OPINION—Filed March 13, 1935

It is hereby ordered that the opinion in the above styled and numbered cause filed February 19, 1935, be corrected

as to the name of Mr. Owen, one of the attorneys for the plaintiff, to show his initials to be "*L. G.*" instead of "*N. G.*" as erroneously written.

Edwin R. McNeill, Chief Justice.

[fol. 41] [File endorsement omitted.]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

DISSENTING OPINION—Filed Feb. 19, 1935

OSBORN, V. C. J. (Dissenting):

As I view it the majority opinion has placed a strained and technical construction upon the Act of Congress involved herein, and does not give due consideration to the spirit, purpose and intent thereof.

By virtue of the decisions quoted in the majority opinion and prior to the permissive Act of Congress (Act Mar. 3, 1921, 41 Stats. At Large 1250) oil operators had escaped all taxation on oil and gas produced from certain Indian lands on the theory that as such operators they constituted Federal Agencies. The State was therefore powerless to claim any revenue whatever for the support of its governmental functions from this natural resource which was rapidly becoming exhausted. The preferment of an oil operator who produced oil from Indian lands over another operator who produced oil from other lands is not sustained by the principles of common justice. To remedy the unfair situation so created the permissive Act of Congress was passed.

The Act specifically grants authority to the State of Oklahoma to levy a gross production tax on all oil and gas produced in Osage County. It is significant that the maximum or minimum tax is not prescribed by the Act. Thus there is manifested a clear intent that the oil and gas produced in Osage County should be taxed on the same basis as oil and gas produced on other lands within the State.

A helpful rule of construction relating to a similar problem involving taxation is announced by the Supreme Court of the United States in the case of Shaffer v. Carter, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 455, wherein it is said:

[fol. 42] "This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction or definition, but upon the practical operation and effect of the tax imposed. St. Louis S. W. Ry. v. Arkansas, 235 U. S. 350, 362; S. 35 S. Ct. 99, 59 L. Ed. 265; Mountain Timber Co. v. Washington, 243 U. S. 219, 37 S. Ct. 260, 61 L. Ed. 685, Ann. Cas. 1917D, 642; Crew Levick Co. v. Pennsylvania, 245 U. S. 294, 38 S. Ct. 126, 62 L. Ed. 295; American Mfg. Co. v. St. Louis, 250 U. S. 459, 39 S. Ct. 522, 63 L. Ed. 1084."

Pursuing the above policy of construction it is apparent that it is immaterial whether the tax involved herein is called an excise tax, a property tax, or a gross production tax. We cannot escape the conclusion that it is a tax on the gross production of oil.

Two reasons are assigned in the majority opinion as to why the tax does not come within the permissive Act of Congress. The first relates to the manner of levy in which it is pointed out that the gross production tax is based on the gross value of oil produced, while the tax involved herein is fixed at a flat rate per barrel of oil. I fail to perceive any manner in which this distinction relates to the practical operation and effect of the tax imposed. The distinction is purely technical and is not justified by the manifest object and purpose of Congress in the enactment of the permissive statute.

It is also pointed out in the majority opinion that the manner of distribution of the gross production tax differs from the manner of distribution of the tax involved herein. An examination of the permissive Act of Congress discloses that the Act does not directly or impliedly provide for the manner in which the tax levied by virtue thereof is to be distributed. On the other hand the Act specifically provides that the tax is to be distributed "as provided by the laws of Oklahoma." It must have been contemplated that there was a possibility that the law providing for the distribution of the gross production tax might be changed or amended and no one would contend that such a change or amendment would invalidate the permissive Act of Con-

gress and result in a withdrawal of said permission to levy and collect such tax. In my judgment it is not within the province of Congress to provide for the manner of distribution or a general tax levy as this is one of the powers vested in a sovereign state.

No complaint is made as to the justice of the tax. The [fols. 43 & 44] benefits flowing from the enforcement of the proration laws apply to all oil operators alike. I do not believe that it was the intention of Congress that operators on Indian lands should profit at the expense of other operators. This identical question was presented to the Federal Court of the Northern District of Oklahoma in the case of Gypsy Oil Co. v. Oklahoma Tax Commission, 6 Fed. Supp. 6. The cause was heard by three Judges. Although the case was decided on a jurisdictional issue the judges announced their respective opinions relating to the validity of the tax. Judges McDermott and Kennedy were of the opinion that the tax levied by Chapter 132, Session Laws 1933, was within the permissive Act of Congress, and Judge Kennamer entertained the opposite view. In my judgment the majority opinion was correct.

But I want to register a most vigorous dissent to some of the reasoning in the majority opinion. It is not for this, or any other court, to speculate upon the motives that actuated Congress to grant the right of taxation on this governmental agency; it is for this court to construe the language of the Act conferring such right. I especially dissent to the expressed theory of the majority opinion set forth therein: "But we should be slow to presume upon consent given, and careful to remain within the limits of the acquiescence or consent heretofore given, and we should not create or presume the right to levy and collect one tax because the National Government has consented to the levy and collection of another and a different tax." This is in conflict with the universal rule that the power of taxation is always construed liberally in favor of the sovereign and a claim of exemption from taxation is construed strictly as against one claiming lact of power to levy. I am unable to perceive a distinction in basic effect from a tax that exacts a per centum of the gross value of a barrel of oil and a fixed tax of a fraction of a cent per barrel.

I therefore respectfully dissent. I am authorized to say that Mr. Justice Busby concurs in this dissenting view.

[fol. 45] [File endorsement omitted.]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PETITION FOR REHEARING AND REQUEST FOR ORAL ARGUMENT —Filed March 4, 1935

Come now the defendants in error, Oklahoma Tax Commission, H. L. McCracken, Raymond D. Thomas, and E. L. Richardson, comprising the membership thereof, successors in office to the above named defendants, Melvin Cornish, John T. Bailey, and W. D. Humphrey, former members of said Oklahoma Tax Commission, as shown by order of substitution entered in the above entitled and numbered cause, and R. B. Connor, as sheriff of Osage County, Oklahoma, and show to the Court that heretofore, to-wit: on the 19th day of February, 1935, this Court rendered its order, judgment, and decree against the above named defendants and in favor of the plaintiffs, Barnsdall Refineries, Inc., et al., in which said judgment, order and decree the said Court held invalid Chapter 132, Session Laws 1933, as applied to oil produced from lands of the Osage Indian Tribe in Osage County, Oklahoma, operated under leases executed by and with the approval of the Secretary of the Interior of the United States, as an unauthorized effort of the State of Oklahoma to levy a tax on a federal governmental agency or instrumentality, and, therefore, being beyond the authority and power of the State of Oklahoma; which said judgment, order, and decree permanently enjoined the defendants, officers of the State of Oklahoma, from collecting the 1/8th of one cent per barrel tax upon the production derived from the above described leases until and unless the consent of the United States Government for the imposition of such tax shall have been given.

That said judgment is erroneous and deprives the State of Oklahoma of the benefits of said Act and the tax imposed thereby, in that said judgment and decree erroneously and [fol. 46] unlawfully holds said act to be outside of and beyond the power of the State of Oklahoma, on the ground that the collection of such tax is an unlawful impingement upon a federal governmental agency or instrumentality, when in truth and in fact said tax is wholly within the scope

of the power of the defendants authorized by valid acts of Congress, to-wit: Section 5, of the Act of Congress of March 3, 1921, 41 Stats. 1250. The said Act of Congress had for its purpose and intent the authorization to the State of Oklahoma to levy any and all taxes upon the gross production of oil and gas derived from Osage leases of the characted involved in this litigation, regardless of the name or designation of such tax, so long and insofar as such tax was uniform with the taxes levied on like production from oil and gas throughout the State of Oklahoma.

If the State of Oklahoma wish to lower the gross production tax, raise the same, or substitute an excise or any other form of taxation on production, and abandon entirely the present gross production tax, so-called, the new tax would be valid as within the terms of the Act of Congress. That being true, then they could add to the present gross production tax any increase thereof under the name of any other tax desired, so long as it applied alike to a tax on all production. The authorization couched in the authority "to levy and collect a gross production tax upon oil and gas" is all-embracive as is shown by the following language: "and all such taxes so collected shall be paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas *as provided by the laws of Oklahoma.*"

In other words, it was not the intention of Congress to restrict for time and eternity the legislative powers of the State of Oklahoma as to its selection of subjects of taxation and the forms thereof. The Constitution of the State of Oklahoma in Section 12, Article 10, authorized the Legislature to levy any number of forms of taxation therein enumerated, several of which could easily be applied to oil and gas production, to-wit: gross revenue, excise, income, graduated income, and "production," and any one of which would come within the provisions of the permissive Act of Congress, because any such tax would be a tax upon the gross production of oil and gas, and would conform to the intent of Congress to permit the State to levy what-[fol. 47] ever tax upon that subject matter, to-wit: gross production of oil and gas, which such State under its laws levied upon like production or non-restricted production.

The Court's attention is directed to that portion of the opinion which defines the tax as an excise tax, and says

that the Legislature went beyond the terms of the permissive Act of Cnogress when it undertook to levy the tax of that nature, to-wit: "excise," as distinguished from gross production. The Court overlooked the proposition that the gross production has reference solely to the subject matter, or corpus, to which the tax, or any tax the Legislature sees fit to enact applies, and has no reference to a circumscribing or restriction or limitation of the legislative function of the State in designating its form of tax. Congress will not be so preemptive, and if so would not have the power to invade the sovereign right of the State to denominate its subjects of taxation and prescribe the form of such taxation. If any other view were taken and the State sought to change its method of taxation by substituting for all other taxes a gross receipts tax, as some states have done, instead of a production tax and other forms of taxation, the opinion as written would immunize and exempt all production from restricted production heretofore authorized by Congress.

It would be interesting to the Court perhaps to recall the remark of Judge McDermott, when the three-judge court passed upon this same question sustaining the position of the State of Oklahoma, when he said: "The fact that it is denominated as an excise tax makes no difference, because it has been my experience that whenever a Legislature wants to enact a new tax and does not know what to call it, they invariably designate it as an excise tax, and after years of experience in passing on tax cases, I do not know what an excise tax is, and I don't think anybody else does."

It was the concurrence of opinion of the federal judges in passing on this same case that so long as the tax was on production and applied alike to all production in the State of Oklahoma, it was immaterial what name the Legislature sought to give the tax.

[fol. 48] It is unthinkable that Congress would permit the State of Oklahoma to enact taxes on gross production of oil and gas that would be so restrictive as to prevent the State from meeting the situations as they arise so that any new tax legislation affecting the entire industry in the State of Oklahoma would not appply to the production from restricted leases, for the reason that, as in the instant case, legislation passes for the benefit of the industry itself

to raise the price and insure a better regulation, is as beneficial and as much to the interest of the producers from restricted production as the others.

Referring more specifically to the three-judge opinion in which this identical question was passed and decided, and which is not even mentioned in this Court's opinion, we quote the following: "And the writer (Judge McDermott) agrees with Judge Kennedy that whatever the character of the tax assailed—whether it is an escise tax or a property tax—it is a tax on gross production of oil within the permissive Act of Congress." * * * Quoting from the concurring opinion of Judge Kennedy, we find the following: "Adverting to the merits, the claim is made by the plaintiff that the tax in question is an excise tax and not a property tax, and therefore not within the permissive Act of Congress, quoted in the opinion of Judge McDermott. It will be noted that there is no specified limitation to the gross production tax there permitted. It is immaterial in the practical construction of the Act of Congress what the tax here may be called. In its nature it is the same type of tax which the State of Oklahoma has already levied on gross production upon the basis of value, (admittedly valid as coming within the permissive Act). Under the challenged law attempt is made to levy a gross production tax upon the basis of volume. There is no distinguishable difference between the two. Both are within the scope of the permissive Act, and I care not whether they may be denominated excise, gross production, or property taxes."

It is a cardinal rule of statutory construction that federal courts, wherever possible, will adopt the construction placed on state statutes by the state courts, and it is likewise a recognized principle of statutory construction that state courts will adopt the construction placed on federal statutes by the federal courts, and since the federal court has given the first construction of the permissive statute [fol. 49] under consideration favorable to a broader power of state taxation than is indicated by the state court opinion, it occurs to us that this court should follow the construction on such Act of Congress by the United States court. The federal court passing on this question was presided over by Circuit Judge McDermott, recognized to be among the very best lawyers and judges in the United States.

The far-reaching results of this case, aside from the taxes which have accrued or may accrue under the act in question, lie in the limitation the Supreme Court in this decision has placed upon the legislative power to levy taxes on oil. The present bills before the Legislature to allow minimum taxes on a barrelage basis and other legislation which the Legislature might in its wisdom determine to be within the sound policy of the State would be jeopardized by the opinion as written.

For the convenience of the Court, a copy of the three-judge federal court opinion in the case entitled Gypsy Oil Company vs. Oklahoma Tax Commission, et al., No. 925-Equity, is attached.

Wherefore, it is respectfully requested that this case be set down for oral argument, that time be given in which to file briefs, and that a rehearing be granted, and the decision heretofore rendered withdrawn, and the tax sustained.

C. D. Cund, C. W. King, A. L. Herr, Attorneys for Oklahoma Tax Commission. Edwin Dabney, George W. Selinger, Attorneys for Proration Department of Corporation Commission of State of Oklahoma.

Copy of Petition for Rehearing has been sent to James B. Diggs, Joe Dickerson, R. W. Garrett, Wm. H. Zwick, and N. G. Owen, by depositing same in the United States mail, with sufficient postage thereon, properly addressed to each, this 4th day of March, 1935.

George W. Selinger.

[fol. 50] IN SUPREME COURT OF OKLAHOMA

ORDER DENYING PETITION FOR REHEARING—Filed March 12, 1935

The Clerk is hereby directed to enter the following orders:

25,181—Barnsdall Refineries, Inc. v. Oklahoma Tax Commission, et al. Petition for rehearing and motion for oral

argument thereon, denied. Osborn, V. C. J., Riley, Busby and Corn, JJ., dissent.

Edwin R. McNeill, Chief Justice.

[File endorsement omitted.]

[fol. 51] [File endorsement omitted.]

In Supreme Court of Oklahoma

[Title omitted]

Order Substituting Parties Defendant—Filed March 6, 1935

Motion of the Defendants in Error having been filed herein showing that since the institution of the above entitled and numbered cause Melven Cornish, John T. Bailey and W. D. Humphrey, as chairman and members of the Oklahoma Tax Commission, have ceased to comprise such Commission, and that they have been succeeded by H. L. McCracken, Raymond D. Thomas and E. L. Richardson, as members of such Commission;

It is therefore ordered that said H. L. McCracken, Raymond D. Thomas and E. L. Richardson be, and they are hereby substituted parties defendant in error in said cause.

Dated this 5th day of March, 1935.

Edwin R. McNeill, Chief Justice.

[fol. 52] [File endorsement omitted.]

In Supreme Court of Oklahoma

[Title omitted]

Præcipe for Transcript of Record—Filed May 11, 1935

To the Clerk of the Supreme Court of the State of Oklahoma:

You will please prepare certified transcript in the above entitled and numbered cause, for review in the Supreme

Court of the United States of America by writ of certiorari from the final judgment rendered against the defendants in said cause on the 12th day of March, 1935.

You will include in said transcript the following:

1. Application of Plaintiffs for Permission to file original suit, and order granting permission;

2. Petition of Plaintiffs;

3. Answer of Defendants;

4. Opinion and judgment of the Court;

5. Dissenting Opinion;

6. Petition for rehearing;

7. Order overruling petition for rehearing;

8. Order substituting parties defendant;

9. Præcipe for transcript.

C. D. Cund, C. W. King, A. L. Herr, Attorneys for Defendants.

[fol. 53] Due service and receipt of a copy of the within præcipe is hereby acknowledged this 7th day of May, 1935.

Edward H. Chandler, James B. Diggs, Joe Dickerson, R. W. Garrett, Wm. H. Zwick, L. G. Owen, Attorneys for Plaintiffs.

[fol. 54] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the Supreme Court of the State of Oklahoma is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U. S.
FILED
JUN 8 1935

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 116

STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION, H. L. McCRACKEN, CHAIRMAN, RAYMOND D. THOMAS AND E. L. RICHARDSON, MEMBERS OF SAID COMMISSION, AND R. B. CONNOR AS SHERIFF OF OSAGE COUNTY, OKLAHOMA,

Petitioners,

vs.

BARNSDALL REFINERIES, INCORPORATED, THE CARTER OIL COMPANY, CHAMPLIN REFINING COMPANY, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA AND BRIEF IN SUPPORT THEREOF.

C. D. CUND,
C. W. KING,
A. L. HERR,
H. L. McCRACKEN,
E. L. RICHARDSON,
EDWIN DABNEY,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 116

STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION, H. L. McCRACKEN, CHAIRMAN, RAYMOND D. THOMAS AND E. L. RICHARDSON, MEMBERS OF SAID COMMISSION, AND R. B. CONNOR AS SHERIFF OF OSAGE COUNTY, OKLAHOMA,

Petitioners,

vs.

BARNSDALL REFINERIES, INCORPORATED, THE CARTER OIL COMPANY, CHAMPLIN REFINING COMPANY, CONTINENTAL OIL COMPANY, DEVONIAN OIL COMPANY, EMPIRE OIL & REFINING COMPANY, THE KEWANEE OIL AND GAS COMPANY, MID-CONTINENT PETROLEUM CORPORATION, L. R. CRAWFORD AND P. C. SPENCER, AS ANCILLARY RECEIVERS FOR PRODUCERS AND REFINERS CORPORATION, THE PURE OIL COMPANY, SHELL PETROLEUM CORPORATION, SINCLAIR PRAIRIE OIL COMPANY, SINCLAIR PRAIRIE OIL MARKETING COMPANY, SKELLY OIL COMPANY, THE TEXAS COMPANY, TIDEWATER OIL COMPANY, THE TWIN STATE OIL COMPANY, THE WISER OIL COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Your petitioners, State of Oklahoma *ex rel.* Oklahoma Tax Commission, H. L. McCracken, Chairman, Raymond D. Thomas and E. L. Richardson, members of said Commis-

sion, and R. B. Connor as Sheriff of Osage County, Oklahoma, most respectfully pray this Honorable Court that a writ of certiorari be granted, to review the proceedings had, and final decision of the Supreme Court of the State of Oklahoma, in a certain case pending in said Court styled and numbered, Barnsdall Refineries, Incorporated, et al., v. Oklahoma Tax Commission, et al., defendants, No. 25181, wherein your petitioners were defendants, and respondents were plaintiffs, and respecting such proceedings and final decision, respectfully represent and show:

Proceedings in the Supreme Court of Oklahoma.

That on the 17th day of November, 1933, the respondents, residents of the State of Oklahoma, as plaintiffs, commenced an original action in the Supreme Court of the State of Oklahoma against your petitioners as defendants, for the purpose of enjoining the collection, as applied to the respondents, oil companies' interests in and to petroleum oil produced under leases held by said respondents on lands in the Osage Indian Nation, one-eighth of one cent per barrel tax on each and every barrel of petroleum oil produced therefrom, levied under the provisions of the Act of the Fourteenth Legislature of the State of Oklahoma, being c. 132, Oklahoma S. L. 1933, for the support and maintenance of the Oil and Gas Proration of Production Department of the State government; the material portions of which are hereinafter set forth.

Respondents are the owners of a large number of departmental oil and gas mining leases, approved by the Department of the Interior, in the Osage Indian Nation, from which leases they produce large quantities of petroleum oil. Respondents in said action, contend that they had a right to produce such oil from said departmental oil and gas mining leases, free from the tax imposed or attempted to be imposed by the Act above mentioned, on the ground that

the oil and gas in the Osage Nation was allotted; and belonged to the Osage Tribe of Indians, which is a dependent Indian tribe under the jurisdiction of the Department of the Interior, and that in producing such oil they were acting as federal agencies under the Act of June 28, 1906 (34 Stats. at L. 539), and particularly as provided by sec. 3 of said Act.

It was further contended by respondents that the tax levied under the above Act is an excise tax, and that the collection of such tax as applied to the lessees', oil companies' interests in and to oil produced from lands in the Osage Indian Nation, was not authorized by the Act of March 3, 1921 (41 Stats. at L. 1250), and that the Act of the Legislature of the State of Oklahoma, above referred to, is unconstitutional as applied to oil produced from lands in the Osage Indian Nation, in that it levies a tax on a governmental agency and deprives respondents of their property without due process of law.

Petitioners herein, in said action, contended that notwithstanding the tax levied under the Act in question is designated an excise tax, it in in fact a tax upon the production of petroleum oil, and the State was authorized to levy such tax on oil produced from lands in the Osage Nation, under the provisions of the Act of March 3, 1921 (41 Stats. at L. 1250).

Upon final hearing of said cause in the Supreme Court of Oklahoma, said Court granted the injunction, and in said cause, held (*Barnsdall Refineries, Inc., et al.*, v. *Oklahoma Tax Commission et al.*, 41 Pac. (2d) 918):

> "The excise tax of one-eighth of one cent per barrel on oil levied by chapter 132, Sess. Laws 1933, when applied to oil produced from lands of the Osage Indian Tribe in Osage County, Okl., by lessees operating under leases executed by and with the approval of the Secretary of the Interior of the United States, is an unauthorized state tax on a federal governmental agency or

instrumentality, and is beyond the authority of the state."

The Supreme Court of Oklahoma further held the levy of the tax unauthorized by the Act of Congress of March 3, 1921 (41 Stats. at L. 1250). Section 5 of the Act provides:

> "That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and distributed, and in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per centum levied as gross production tax, to be distributed as provided by the laws of Oklahoma; Provided, that the Secretary of the Interior is hereby authorized and directed to pay, through the proper offices of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein; Provided further, that the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only."

That the opinion in the above cause was rendered on the 19th day of February, 1935; that your petitioners thereafter, and in due time, under the rules of the Supreme Court of the State of Oklahoma, filed their petition for rehearing in said cause, which said petition was denied on the 12th day of March, 1935, and your petitioners, therefore, aver that the judgment of the Supreme Court of the State of Oklahoma in said cause became final on the 12th day of March, 1935.

Your petitioners further state that there was drawn in question in said cause, the validity of a statute of the State of Oklahoma on the ground that, as applied to the facts in said cause, the tax thereby levied and attempted to be collected was a tax on a governmental agency or instrumentality and, therefore, in violation of the Act of Congress of June 28, 1906 (34 Stats. at L. 539), and repugnant to the Fourteenth Amendment to the Constitution of the United States, in that an attempt to tax respondents thereunder deprived them of their property without due process of law.

That the statute of the State of Oklahoma drawn in question in said cause, was c. 132, Oklahoma S. L. 1933, the material parts of which provide:

> "Until June 30, 1935, there is hereby levied an excise tax of one-eighth of one cent per barrel on each and every barrel of petroleum oil produced in the State of Oklahoma after the passage and approval of this act. Such excise tax of one-eighth of one cent per barrel shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as is now provided by Chapter 66, Article 5 of the Oklahoma Session Laws of 1931, for the collection of gross production tax on petroleum oil. On petroleum oil sold at the time of production, the excise tax thereon shall be paid by the purchaser, who is hereby authorized to deduct, in making settlement with the producer and/or royalty owner, the amount of tax so paid; provided that in the event oil on which such tax becomes due is not sold at the time of production, but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself, including the tax due on royalty oil not sold; provided further, that in settlement with the royalty owner, such producer shall have the right to deduct the amount of tax so paid on royalty oil, or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of tax paid."
>
> "All funds derived from the levy of the tax of one-eighth of one cent per barrel on petroleum oil produced

in the State of Oklahoma shall be deposited in the State Treasury to the credit of a separate and distinct fund to be known as the "Proration Fund." All moneys in said fund are hereby appropriated, and shall be used, for the payment of salaries and expenses, including premiums on surety bonds as are required by law, of the Proration Umpire, Assistant Proration Umpire, deputy umpires, Proration Attorney, reporters, stenographers and clerks, and all items of office expense and office supplies, including stationery, telegraph and telephone, postage and printing, and all other items of expense, as fixed and authorized by the provisions of House Bill No. 481, of the Acts of the Fourteenth Session of the Legislature of the State of Oklahoma, but no salary, and no expense account of either of such officials or employees herein named, and no item of expense for office supplies or other items of office expense, shall be allowed until the same has been itemized and verified by claimant, and approved by the Proration Umpire, and, when so approved, the State Auditor shall draw his warrants therefor upon the State Treasury, and the same shall be paid out of the "Proration Fund" hereby created."

That the final decision of the Supreme Court of the State of Oklahoma was against the validity of said statute as applied to the lessees' interests in petroleum oil produced from lands in the Osage Indian Nation.

Your petitioners further allege that there was also drawn in question in said cause, the right of respondent Oklahoma Tax Commission, to levy and collect said tax upon the said lessees' interests in petroleum oil produced from lands in the Osage Indian Nation under the provisions of the Act of March 3, 1921 (41 Stats. at L. 1250), and that the final decision of the Supreme Court of the State of Oklahoma was against the right of the respondents to collect the tax thereunder.

Your petitioners believe and, therefore, assert, that the final decision of the Supreme Court of the State of Okla-

homa against the rights, privileges and immunities of your petitioners under the Constitution and statutes of the United States specially set up and claimed in said cause, is erroneous in the following particulars, to-wit:

Assignments of Error.

I.

The Supreme Court of the State of Oklahoma erred in holding that an excise tax of one-eighth of one cent per barrel on oil levied by c. 132, Oklahoma S. L. 1933, when applied to oil produced from the lands of the Osage Tribe in Osage County, Oklahoma, by lessees operating under leases executed by, and with the approval of the Secretary of the Interior of the United States, is an unauthorized tax on a federal governmental agency or instrumentality, and as beyond the authority of the State.

II.

The Supreme Court of the State of Oklahoma erred in holding that the tax levied by said c. 132, Oklahoma S. L. 1933, is an excise tax, and the levy thereof not authorized by the Act of March 3, 1921 (41 Stats. at L. 1250).

III.

The Supreme Court of the State of Oklahoma erred in granting the injunction.

Your petitioners aver that the decision of the Supreme Court of the State of Oklahoma, the highest court of said State, was in every instance against the rights, privileges and immunities set up by them in said cause.

Accompanying this application, and under the same cover, your petitioners present a brief showing more fully their views upon the question involved; also, exhibit as a part of this petition a full and complete transcript of the record in said cause, duly certified.

Your petitioners aver that they have no right to a review of the decision of the Supreme Court of the State of Oklahoma by this Honorable Court on appeal.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of, and under the seal of this Court directed to the Supreme Court of the State of Oklahoma, commanding said court to certify and send to this Court on a day certain, to be therein designated, a full and complete transcript of the record and all proceedings of the said Supreme Court of Oklahoma in this case, which is entitled in that Court: "In the Supreme Court of the State of Oklahoma, Barnsdall Refineries, Incorporated, et al., plaintiffs, vs. Oklahoma Tax Commission, et al., defendants, No. 25181." to the end that the said cause may be reviewed and determined by this Court as provided by law, and that your petitioners have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the said judgment of the Supreme Court of the State of Oklahoma be reversed by this Honorable Court.

STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION, H. L. MCCRACKEN, CHAIRMAN, RAYMOND D. THOMAS AND E. L. RICHARDSON, MEMBERS OF SAID COMMISSION, AND R. B. CONNOR AS SHERIFF OF OSAGE COUNTY, OKLAHOMA:

By C. D. CUND,
C. W. KING,
A. L. HERR,
H. L. MCCRACKEN,
E. L. RICHARDSON,
EDWIN DABNEY,
Their Attorneys.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 116

STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION, H. L. McCRACKEN, CHAIRMAN, RAYMOND D. THOMAS AND E. L. RICHARDSON, MEMBERS OF SAID COMMISSION, AND R. B. CONNOR AS SHERIFF OF OSAGE COUNTY, OKLAHOMA,

Petitioners,

vs.

BARNSDALL REFINERIES, INCORPORATED, THE CARTER OIL COMPANY, CHAMPLIN REFINING COMPANY, CONTINENTAL OIL COMPANY, DEVONIAN OIL COMPANY, EMPIRE OIL & REFINING COMPANY, THE KEWANEE OIL AND GAS COMPANY, MID-CONTINENT PETROLEUM CORPORATION, L. R. CRAWFORD AND P. C. SPENCER, AS ANCILLARY RECEIVERS FOR PRODUCERS AND REFINERS CORPORATION, THE PURE OIL COMPANY, SHELL PETROLEUM CORPORATION, SINCLAIR PRAIRIE OIL COMPANY, SINCLAIR PRAIRIE OIL MARKETING COMPANY, SKELLY OIL COMPANY, THE TEXAS COMPANY, TIDEWATER OIL COMPANY, THE TWIN STATE OIL COMPANY, THE WISER OIL COMPANY,

Respondents.

SUPPORTING BRIEF OF PETITIONERS.

The question involved in this proceeding is the right of the State of Oklahoma to collect one-eighth of one cent per barrel tax on petroleum oil levied under the Act of April

10, 1933, c. 132, Oklahoma S. L. 1933, page 301, as applied to the five-sixth working interest owned by the respondent, oil companies, lessees under departmental leases for the production of petroleum oil and gas held by them on Osage Indian lands. The tax is levied by sec. 1 of the Act, which provides:

> "Until June 30, 1935, there is hereby levied an excise tax of one-eighth of one cent per barrel on each and every barrel of petroleum oil produced in the State of Oklahoma after the passage and approval of this act. Such excise tax of one-eighth of one cent per barrel shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as is now provided by Chapter 66, Article 5 of the Oklahoma Session Laws of 1931, for the collection of gross production tax on petroleum oil. On petroleum oil sold at the time of production, the excise tax thereon shall be paid by the purchaser, who is hereby authorized to deduct, in making settlement with the producer and/or royalty owner, the amount of tax so paid; provided that in the event oil on which such tax becomes due is not sold at the time of production, but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself, including the tax due on royalty oil not sold; provided further, that in settlement with the royalty owner, such producer shall have the right to deduct the amount of tax so paid on royalty oil, or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of tax paid."

The purpose for which the Act is levied is set forth in sec. 2 of the Act, which is as follows:

> "All funds derived from the levy of the tax of one-eighth of one cent per barrel on petroleum oil produced in the State of Oklahoma shall be deposited in the State Treasury to the credit of a separate and distinct fund to be known as the "Proration Fund". All

moneys in said fund are hereby appropriated, and shall be used, for the payment of salaries and expenses, including premiums on surety bonds as are required by law, of the Proration Umpire, Assistant Proration Umpire, deputy umpires, Proration Attorney, reporters, stenographers and clerks, and all items of office expense and office supplies, including stationery, telegraph and telephone, postage and printing, and all other items of expense, as fixed and authorized by the provisions of House Bill No. 481, of the Acts of the Fourteenth Session of the Legislature of the State of Oklahoma, but no salary, and no expense account of either of such officials or employees herein named, and no item of expense for office supplies or other items of office expense, shall be allowed until the same has been itemized and verified by claimant, and approved by the Proration Umpire, and, when so approved, the State Auditor shall draw his warrants therefor upon the State Treasury, and the same shall be paid out of the "Proration Fund" hereby created."

Respondents are the owners of a large number of departmental oil and gas mining leases approved by the Department of the Interior, in the Osage Indian Nation, from which leases they produce large quantities of petroleum oil. Their action was based in the Supreme Court of the State of Oklahoma on the theory that they had a right to produce such oil from said departmental oil and gas leases, free from the tax imposed or intended to be imposed by the Act above mentioned, upon the ground that the oil and gas in the Osage Nation was allotted and belonged to the Osage tribe of Indians, which is an independent Indian tribe, under the jurisdiction of the Department of the Interior, and that in producing such oil they were acting as federal agencies under the Act of June 28, 1906 (34 Stats. at L. 539) as amended by the Act of March 3, 1921 (41 Stats. at L. 1249), and as further amended by the Act of March 2, 1929 (45 Stats. at L. 478), and that the State of

Oklahoma was without authority to levy a tax on lessee companies' interest in the petroleum oil so produced without the consent of Congress. It was further contended by respondents in said action that the Act of March 3, 1921 (41 Stats. at L. 1250) was insufficient to authorize the collection of the tax in question. Section 5 of this Act provides:

> "That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and distributed, and in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per centum levied as gross production tax, to be distributed as provided by the laws of Oklahoma; Provided, that the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein; Provided further, that the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only."

The Supreme Court of the State of Oklahoma sustained this contention, and enjoined the collection of the tax: *Barnsdall Refineries, Incorporated, et al,* v. *Oklahoma Tax Commission, et al.*, 41 Pac. (2d) 981.

We deem it unnecessary to set out in detail the Acts of Congress relied upon by respondents to sustain their contention that the leases held by them in this action, are governmental instrumentalities; but it may be stated that respondents rely upon the rule set out in the following:

Choctaw, Oklahoma & Gulf R. Co. v. *Harrison*, 235 U. S. 292;

Indian Territory Illuminating Oil Co., v. *Oklahoma*, 240 U. S. 522;

Gillespie v. *Oklahoma*, 257 U. S. 501;

Jaybird Mining Co. v. *Weir*, 271 U. S. 609;

Burnet v. *Coronado Oil & Gas Co.*, 285 U. S. 393.

It is contended by petitioners that the tax in question is within the permissive grant of authority by Congress authorizing the levy and collection of taxes, upon production of oil and gas, from land in the Osage Indian Nation. Petitioners contend that Sec. 5 of the Act of March 3, 1921 (41 Stats. at L. 1250, *supra*), authorizes the State to levy and collect such tax.

The Supreme Court of the State of Oklahoma held the tax in question an excise tax, and the levy thereof, therefore, not authorized by the Act of March 3, 1931, *supra*. It is our contention that notwithstanding the tax in question is denominated an excise tax by the Legislature of the State of Oklahoma, it is in truth and in fact a tax upon the production of petroleum oil and, therefore, authorized by the Act of Congress above cited. It will be noticed the Act provides that the State of Oklahoma is authorized from and after the passage thereof, to levy and collect a gross production tax on all oil and gas produced in Osage County, Oklahoma. The amount of the tax authorized to be levied thereunder is not limited. The only limitation or qualification provided by the Act is that all taxes so collected "shall be paid and distributed, and shall be in lieu

of all other State and county taxes levied upon the production of oil or gas as provided by the laws of Oklahoma". If, therefore, the Act of the Oklahoma Legislature of 1933 be construed as we contend it should be, as levying an additional gross production tax upon the oil produced in the Osage Nation, such Act is clearly authorized by the provisions of the Act of Congress above cited. The fact that the Legislature in adopting the Act designed the tax in question as an excise tax is immaterial. The courts look to the intention and purpose of the Legislature in enacting the law levying the tax, and upon the practical effect and operation of said tax so imposed. In the case of *St. Louis Southern R. Co.* v. *State of Arkansas,* 234 U. S. 350, this Court said:

> "In determining the nature of a tax and constitutionality of the statute imposing it, this Court must regard substance rather than form and the controlling test is found in the effect as applied and enforced."

See also:

Shaffer v. *Carter, State Auditor,* 252 U. S. 257;
Mountain Timber Co. v. *Washington,* 243 U. S. 219;
Crew Levick Co. v. *Pennsylvania,* 240 U. S. 292;
American Mfg. Co. v. *St. Louis,* 250 U. S. 459.

The tax in question was levied for the purpose of raising funds to enforce the proration law enacted by the Legislature of the State of Oklahoma in 1933 (c. 131, Okla. S. L. 1933), which law was enacted to prevent waste, and protect the oil industry of the State. No ad valorem tax is levied against the property of the respondents, and the tax of one-eighth of one cent per barrel on each barrel of oil produced for the payment of expenses incident to the enforcement of the proration law, is the same kind and character of tax levied under sec. 2434, O. S. 1921 and is, therefore,

within the permissive Act of Congress (sec. 5, Act of March 3, 1921) (41 Stats. at L. 1250, *supra*).

The Supreme Court of Oklahoma in holding that the levying of the tax in question was not authorized by the Act of Congress herein relied upon, in the case of *Barnsdall Refineries, Inc., et al.* v. *Oklahoma Tax Commission, supra,* at Page 920, said:

> "Having concluded that this tax is an excise tax, and it not being contended that there is any specific consent to the levy and collection of an excise tax, we must determine whether this tax is consented to by the Act of Congress of March 3d, 1921, consenting to the levy and collection of a state gross production tax.
>
> Since the adoption of the legislative act of 1916, the 3 per centum tax thereunder levied and collected has been commonly known and referred to as the 'gross production tax.' That act provides specifically that the tax therein levied shall and should be 'in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases,' etc. O. S. 1931, sec. 12434. The act also provided that the funds collected should be distributed and expended for the three purposes heretofore stated. O. S. 1921, sec. 12445.
>
> This one-eighth of one cent tax is levied on each barrel of oil without regard to the value of the oil taxed. It is not a per centum tax as is the gross production tax. The money collected for gross production tax is distributed two-thirds for current expense of state government, and the remaining one-third is distributed one-half to the common schools of the county where the oil is produced, and one-half in aid of the construction of permanent roads and bridges of the county where the oil is produced, while the money collected for the one-eighth of one cent excise tax is not distributed in general over the state, nor is any of it restricted to or

required to be expended in the county where the oil is produced, but on the contrary, this money goes into the 'proration fund' and is used to pay expenses of maintaining and enforcing proration only in and for those pools or common sources of supply of oil where the conditions are such that the full production of oil from that common source of supply cannot be taken without constituting waste. Considering the differences in the method of levying of the gross production tax and the excise tax here under consideration, and the different method of distribution of the gross production tax collections and the excise tax collections, Congress might well have consented to the imposition of the gross production tax in the language above quoted from the congressional act, without having any inclination or intention of consenting to the imposition of such a tax as the excise tax here under consideration. As regards the matters here under consideration, the duty, purpose, and policy of the United States government was to look after and provide for the general well-being of the Osage Indians, and provide for the care and protection of their property. The Congress might well have observed and considered the benefits that would be received by the Osage Indians in Osage county, Okla., by the collection of the gross production tax and the expenditure thereof in the method and for the three purposes provided in that act. The same federal authority might not observe such benefits as would justify the government in consenting to this excise tax on the oil produced from the Osage Indian lands. This proration fund may or may not be expended in Osage county. There may be but few common sources of supply in Oklahoma to which the proration law would apply, in which event all collections of this excise tax would be used in the enforcement of the proration law in and for those pools or sources of supply which come within the provisions of the proration law. Such pools or sources of supply may of course decrease in number and may be far removed from the Osage Indian lands. The enforcement of this Act, however beneficial

to those common sources of supply where it is applicable, and however beneficial indirectly in and to other oil fields, might or might not in the opinion of governmental authorities be beneficial to the wards of the government, the Osage Indians. The Congress might or might not consent to the levy and collection of this excise tax.

Congress might have withheld consent to the levy and collection of any state tax on these government instrumentalities. The state of Oklahoma thus far has withheld consent to the collection of federal taxes on similar state instrumentalities, and the objections to such federal taxes as constituting burdens on state instrumentalities has been sustained. *Burnet* v. *Coronada Oil & Gas Co.*, 285 U. S. 393, 52 S. Ct. 443, 76 L. Ed. 815."

It will thus be seen that the Supreme Court of Oklahoma based its conclusion on the theory that the tax under the Act in question was based on volume rather than on the value of the oil produced, and that it was to be distributed in a different manner than as provided by sec. 12445, O. S. 1931, the law then in existence levying a gross production tax upon petroleum oil produced in the State.

We contend that in so holding, the Supreme Court of Oklahoma erred. It will be observed that the permissive Act of Congress herein relied upon, does not limit the State in the manner in which the tax levied and collected on petroleum oil in the Osage Nation, shall be distributed, nor does it limit the amount of the tax the State is authorized to levy. The Act simply provides that all taxes so collected "shall be paid and distributed, and shall be in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of the State of Oklahoma," thus leaving it within the discretion of the State to distribute the tax so collected in such manner as the Legislature may direct. The challenged tax, therefore, in

our opinion comes clearly within the permissive Acts of Congress, and the injunction should have been denied by the Supreme Court of Oklahoma. In this conclusion we are sustained by the opinion of the United States District Court for the Northern District of Oklahoma, three judges presiding, in the case of *Gypsy Oil Co.* v. *Oklahoma Tax Commission,* 6 Fed. Supp. 6, Judge Kennamer dissenting. In that case in an opinion by Judge McDermott, after expressing some doubt as to whether the Court had jurisdiction, the Court said:

> "It may therefore be said that Judge Kennamer agrees with Judge Kennedy that there is no adequate remedy at law; and that the writer agrees with Judge Kennedy that whatever the character of the tax assailed—whether it is an excise tax or a property tax—it is a tax on gross production of oil within the permissive act of Congress."

Judge Kennedy in a concurring opinion, after expressing the opinion that the Court had jurisdiction, said:

> "Adverting to the merits, the claim is made by plaintiff that the tax in question is an excise tax and not a property tax, and therefore not within the permissive act of Congress quoted in the opinion of Judge McDermott. It will be noted that there is no specified limit to the gross production tax there permitted. It is immaterial in the practical construction of the act of Congress what the tax here may be called. In its nature it is the same type of tax which the state of Oklahoma has already levied on gross production upon the basis of value (admittedly valid as coming within the permissive act). Under the challenged law, attempt is made to levy a gross production tax upon the basis of volume. There is no distinguishable difference between the two. Both are within the scope of the permissive act, and I care not whether they may be denominated excise, gross production, or property taxes.

> In our interpretation and construction we should follow the principle aptly stated in *Shaffer* v. *Carter*, 252 U. S. 37, where the Supreme Court in speaking of state taxation laws, uses language at page 55, 40 S. Ct. 221, 226, 64 L. Ed. 445 as follows: 'This argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the federal Constitution. For, where the question is whether a state taxing law contravenes rights secured by that instrument, the decision must depend not upon any mere question of form, construction, or definition, but upon the practical operation and effect of the tax imposed.'
>
> I think the tax here challenged comes clearly within the permissive act, and I care not whether they may the bill should be dismissed upon the merits."

While the decree in that case was modified on appeal by this Court (*Gypsy Oil Co.* v. *Oklahoma Tax Commission*, 292 U. S. 611), ordering it modified so as to provide that the complaint be dismissed upon the ground that the district court was without jurisdiction because the requisite jurisdictional amount was not involved, we quote the language used by the judges in that case because of the reasoning involved and adopt such reasoning as a part of our argument in this case. We also refer to the dissenting opinion by Mr. Justice Osborne of the Supreme Court of Oklahoma, in the case of *Barnsdall Refineries, et al.* v. *Oklahoma Tax Commission* (41 Pac. 2d) at page 922, wherein the Justice said:

> "Two reasons are assigned in the majority opinion as to why the tax does not come within the permissive act of Congress. The first relates to the manner of levy in which it is pointed out that the gross production tax is based on the gross value of oil produced, while the tax involved herein is fixed at a flat rate per barrel of oil. I fail to perceive any manner in which this distinction relates to the practical operation and

effect of the tax imposed. The distinction is purely technical and is not justified by the manifest object and purpose of Congress in the enactment of the permissive statute.

"It is also pointed out in the majority opinion that the manner of distribution of the gross production tax differs from the manner of distribution of the tax involved herein. An examination of the permissive act of Congress discloses that the act does not directly or impliedly provide for the manner in which the tax levied by virtue thereof is to be distributed. On the other hand, the act specifically provides that the tax is to be distributed 'as provided by the laws of Oklahoma.' *It must have been contemplated that there was a possibility that the law providing for the distribution of the gross production tax might be changed or amended, and no one would contend that such a change or amendment would invalidate the permissive act of Congress and result in a withdrawal of said permission to levy and collect such tax.* In my judgment it is not within the province of Congress to provide for the manner of distribution or a general tax levy, as this is one of the powers vested in a sovereign state." (Emphasis ours.)

In our opinion the reasoning of Mr. Justice Osborne, in his dissenting opinion, is unanswerable, and such reasoning should be followed by this Court.

The Supreme Court of the United States in the case of *Storaasli* v. *State of Minnesota*, 283 U. S. 57, said:

"Federal court, while bound by State Court's decision construing state tax law, decides for itself character of state tax and its constitutionality."

At page 62, in the body of the opinion:

"This Court, while bound by the state court's decision as to the meaning and application of the law, *decides for itself the character of the tax, and whether as applied to the appellant it affects his constitutional rights.*" (Emphasis ours.)

An inferior federal court held the tax to be an additional gross production tax. The State Supreme Court held the tax to be an excise tax. Under the above rule, this Court is free to determine the character of the tax, notwithstanding the state court's decision, and particularly is this true in the above case because of the fact that the statute is construed in the light of an Act of Congress which has been construed by a federal court to embrace the one-eighth of one cent tax as an additional gross production tax.

We are herewith attaching as an appendix to this brief, such statutes and portions thereof as we deem material to the issues herein involved.

We respectfully submit that the Supreme Court of the State of Oklahoma erred in holding the Act in question invalid, and that this Court should, therefore, grant the writ of certiorari.

Respectfully submitted,

STATE OF OKLAHOMA EX REL. OKLAHOMA TAX COMMISSION, H. L. McCRACKEN, CHAIRMAN, RAYMOND D. THOMAS AND E. L. RICHARDSON, MEMBERS OF SAID COMMISSION, AND R. B. CONNOR, AS SHERIFF OF OSAGE COUNTY, OKLAHOMA,

By C. D. CUND,
C. W. KING,
A. L. HERR,
H. L. McCRACKEN,
E. L. RICHARDSON,
EDWIN DABNEY,
Their Attorneys.

APPENDIX TO BRIEF.

Chapter 132, Oklahoma Session Laws 1933.

Petroleum—Excise Tax—Rate of Levy.

Section 1. Until June 30, 1935, there is hereby levied an excise tax of one-eighth of one cent per barrel on each and every barrel of petroleum oil produced in the State of Oklahoma after the passage and approval of this Act. Such excise tax of one-eighth of one cent per barrel shall be reported to and collected by the Oklahoma Tax Commission at the same time and in the same manner as is now provided by Chapter 66, Article 5 of the Oklahoma Session Laws of 1931, for the collection of gross production tax on petroleum oil. On petroleum oil sold at the time of production, the excise tax thereon shall be paid by the purchaser, who is hereby authorized to deduct, in making settlement with the producer and/or royalty owner, the amount of tax so paid; provided that in the event oil on which such tax becomes due is not sold at the time of production, but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself, including the tax due on royalty oil not sold; provided further, that in settlement with the royalty owner, such producer shall have the right to deduct the amount of tax so paid on royalty oil, or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of tax paid.

Proration Fund—Use of Money Constituting.

Section 2. All funds derived from the levy of the tax of one-eighth of one cent per barrel on petroleum oil produced in the State of Oklahoma shall be deposited in the State Treasury to the credit of a separate and distinct fund to be known as the "Proration Fund." All moneys in said fund are hereby appropriated, and shall be used for the payment of salaries and expenses, including premiums on surety bonds as are required by law, of the Proration Umpire, Assistant Proration Umpire, deputy

umpires, Proration Attorney, reporters, stenographers and clerks, and all items of office expense and office supplies, including stationery, telegraph and telephone, postage and printing, and all other items of expense, as fixed and authorized by the provisions of House Bill No. 481, of the Acts of the Fourteenth Session of the Legislature of the State of Oklahoma, but no salary, and no expense account of either of such officials or employees herein named, and no item of expense for office supplies or other items of expense, shall be allowed until the same has been itemized and verified by claimant, and approved by the Proration Umpire, and, when so approved, the State Auditor shall draw his warrants therefor upon the State Treasury, and the same shall be paid out of the "Proration Fund" hereby created.

Tax—When Due—Delinquent—Lien on Property.

Section 3. The tax provided for in Section 1 hereof shall become due on the first day of each calendar month on all petroleum oil produced in the State of Oklahoma during the preceding monthly period, and if the tax is not paid on or before the end of such month the same becomes due, such tax shall become delinquent and from such time shall, as a penalty for such delinquency, bear interest at the rate of eighteen per centum per annum. When any tax provided for in this Act shall become delinquent, as above provided, the Oklahoma Tax Commission shall issue its warrant directed to the sheriff of any county for the collection of the amount of said tax, interest, and penalty, and the sheriff to whom said warrant shall be directed shall proceed to levy upon the property, assets, and effects of the person, firm, association, or corporation purchasing or producing petroleum oil required hereby to pay the tax so assessed, and to sell the same and to make return thereof as upon execution. Such tax, interest, and penalty shall constitute and remain a lien upon the property, assets, and effects of such person, firm, association, or corporation, purchasing or producing petroleum oil and hereby required to pay said tax until the same is paid, and may be recovered at suit of the State in any court of competent juris-

diction wherein any such person, firm, association, or corporation may own or have property, assets, and effects therein located.

Perjury—Making False Oath.

Section 4. Any person who shall make any false oath to any report required by the provisions of this Act shall be deemed guilty of perjury.

Oklahoma Tax Commission—Examine Books and Records.

Section 5. If any person, firm, association, or corporation shall fail to make the report of the production and purchase, or production without sale, as the case may be, of petroleum oil, or the computation of the excise tax hereby levied, within the time prescribed by law for such report, it shall be the duty of the Oklahoma Tax Commission to examine the books, records, and files of such person, firm, association, or corporation to ascertain the amount of oil produced and/or sold, and to compute the taxes thereon, as provided herein, to which shall be added the costs of such examination, together with any and all penalties accrued thereon; and any person, firm, association or corporation who shall fail to file any sworn statement or report required by the provisions of this Act, in the manner and in the time prescribed, shall be liable to a penalty of five hundred dollars for each day such person, firm, association or corporation shall fail or refuse to file such statement or report or comply with the provisions hereof, which shall be a lien upon all the property and assets of such person, firm, association, or corporation located in this State, and may be recovered at a suit of the State in any court of competent jurisdiction.

Effect of Unconstitutionality of Any Section.

Section 6. If any section, paragraph, sentence, or phrase of this Act shall be declared unconstitutional or void for any reason by any court of final jurisdiction, such act shall not in any way affect the remaining sections, paragraphs,

sentences, or phrases of this Act, but the same shall continue in full force and effect.

Approved April 10, 1933. Emergency.

Chapter 66, Article 5, Oklahoma Session Laws 1931.

Tax—Paid on Monthly Basis—Oklahoma Tax Commission.

Section 1. The gross production tax on petroleum oil, natural gas or casinghead gas, as provided by law, shall, after June 30, 1931, be paid on a monthly basis in accordance with this Act.

Said tax shall become due on the first day of each calendar month on all petroleum oil, natural gas or casinghead gas produced and saved during the preceding monthly period, and if the tax is not paid on or before the end of said month the same becomes due the tax shall become delinquent and shall be collected in the manner provided by law for the collection of delinquent gross production taxes.

On oil, gas or casinghead gas sold at the time of production the gross production tax thereon shall be paid by the purchaser of such products and such purchaser shall, and is hereby authorized to deduct in making settlements with the producer and/or royalty owner the amount of tax so paid; provided, that in the event oil on which such gross production tax becomes due is not sold at the time of production but is retained by the producer, the tax on such oil not so sold shall be paid by the producer for himself including the tax due on royalty oil not sold; provided, further, that in settlement with the royalty owner such producer shall have the right to deduct the amount of such tax so paid on royalty oil, or to deduct therefrom royalty oil equivalent in value at the time such tax becomes due with the amount of the tax paid.

Casinghead gas when utilized in the manufacture of casinghead gasoline by the producer shall be considered for the purpose of this Act as to the amount utilized as casinghead gas actually sold.

In case oil, gas or casinghead gas is sold under circumstances where the sale price does not represent the cash price

thereof prevailing for oil, gas or casinghead gas of like kind, character or quality in the field from which such product is produced, the Oklahoma Tax Commission may require the said tax to be paid upon the basis of the prevailing price then being paid at the time of production thereof in said field for oil, gas or casinghead gas of like kind, quality and character.

Section 12434, Oklahoma Statutes 1931.

12434. *Quarter Annual Reports—Oil, Gas, Mineral Production—Taxes—Regulation:*

Every person, firm, association or corporation engaged in the mining or production within this state of asphalt or of ores bearing lead, zinc, jack, gold, silver or copper, or of petroleum or other crude oil or other mineral oil or of natural gas, shall within thirty days after the expiration of the quarter-annual period ending on the last day of March, A. D. 1916, and of each quarter-annual period thereafter expiring respectively, on the last day of June, September, December and March of each year, file with the State Auditor, a statement under oath, on forms prescribed by him showing the location of each mine or oil or gas well operated by such person, firm, corporation or association during the last preceding quarter-annual period; the kind of such mineral, oil or gas produced; the gross amount thereof produced, and the actual cash value thereof at the place of production; the amount of the royalty payable thereon, if any, to whom payable and whether it is claimed that such royalty is exempt from taxation by law, and the facts on which such claim of exemption, if any, is based; and such other information pertaining thereto as the State Auditor may require, and shall at the same time pay to the State Auditor a tax equal to one-half of one per centum of the gross value of asphalt and of ores bearing lead, zinc, jack, gold, silver and copper produced, less the royalty interest, and equal to three per centum of the gross value of the production of petroleum or other crude or mineral oil and of natural gas, less the royalty interest. The owner of any royalty interest shall pay to the State Auditor the tax herein imposed upon such royalty in-

terest within the time and in the manner provided by this Act.

The tax hereby declared shall also attach to and is levied on what is known as the royalty interest except such royalty interest of the State of Oklahoma or such royalty interests as are exempted from taxation under the laws of the United States and the amount of the tax on the royalty interest shall be a lien on such interest.

The State Auditor shall have power to require any such person, firm, corporation or association engaged in mining or the production of such asphalt, mineral ores aforesaid, petroleum or other crude oil or other mineral oil and natural gas or owner of any royalty interest therein to furnish any additional information by him deemed to be necessary for the purpose of correctly computing the amount of said tax and to examine the books, records, and files of such person, firm, corporation or association and shall have power to examine witnesses, and if any witness shall fail or refuse to appear and testify at the summons or requests of the State Auditor, said State Auditor shall certify the facts and the name of the witness so failing and refusing to appear and testify or to produce any book, record or file to the district court of this State having jurisdiction of the party, and said court shall thereupon issue a summons to said party to appear and give such evidence and produce such books, records and files as may be required and upon failing to do so, the offending party shall be punished as provided by law in cases of contempt.

The State Auditor shall have power to ascertain and determine whether or not any return herein required is a true and correct return of the gross products and of the value thereof of such person, firm, corporation or association engaged in the mining or production of asphalt and ores bearing minerals aforesaid and of petroleum or other crude oil or mineral oil and of natural gas, and if any person, firm, corporation or association has made an untrue or incorrect return of the gross production or value thereof, as hereinbefore required, or has failed or refused to make such return, the said State Auditor shall ascertain the correct amount of either, and compute said tax.

The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state, counties, cities, towns, townships, school districts and other municipalities upon any property rights attached to or inherent in the right to said minerals, upon leases for the mining of asphalt and ores bearing lead, zinc, jack, gold, silver or copper or for petroleum or other crude oil or other mineral oil, or for natural gas upon the mineral rights and privileges for the minerals aforesaid belonging or appertaining to land, upon the machinery, appliances and equipment used in and around any well producing petroleum or other crude or mineral oil or natural gas, or any mine producing asphalt, or any of the mineral ores aforesaid and actually used in the operation of such well or mine; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned during the tax year in which the same is produced, and upon any investment in any of the leases, rights, privileges, minerals or property hereinbefore in this paragraph mentioned or described; but any interest in the land other than that herein enumerated, and oil in storage, asphalt, ores bearing the minerals hereinbefore named, mined, produced and on hand at the date as of which property is assessed for general and ad valorem taxation for any subsequent tax year shall be assessed and taxed as other property within the taxing district in which such property is situated at the time.

The State Board of Equalization, upon its own initiative, may, and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated, including the value of oil, gas, or mineral lease, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of in and around any such well or mine, the value of the oil, gas asphalt or any of the said mineral ores produced and any other element of taxable value in lieu of which the tax herein is levied. The said board shall have power and it shall be

its duty to raise or lower the rates herein imposed to conform thereto. An appeal may be had from the decision of the State Board of Equalization thereon, by any person aggrieved, to the Supreme Court, in like manner and with like effect as provided by law in other appeals from said Board to said court; provided, that after such tax has been collected and distributed, or paid without protest, no complaint with reference to rate thereof shall be heard or considered.

Section 12445.

Oklahoma Statutes 1931.

12445. *Distribution and Uses of Taxes.*

The gross production tax provided for in this Act is hereby levied and collected for the following specific purposes, to-wit:

(1) For current expenses of State Government: Two-thirds.

(2) For and in aid of the common schools of the county from whence the oil or gas and other mineral is produced, one-sixth, (five mills).

(3) For and in aid of the construction of permanent roads and bridges of the county from whence the oil and gas and other mineral is produced, one-sixth (five mills).

It shall be the duty of the State Auditor to pay two-thirds of all gross production taxes levied and collected under the provisions of this Act to the State Treasurer to be credited to the general revenue fund of the State, and applied to the current expenses of State Government; and to pay one-third the sum collected from each county whence the oil or gas or asphalt or of ores bearing lead, zinc, jack, gold, silver or copper was produced to the county treasurer of such county; one-half the amount so paid to the county treasurer to be credited to the common school fund of the county in proportion to the school population of such county; the remaining one-half so paid to the county treas-

urer to be credited to a fund of such county known as the road and bridge fund, provided, that should the rate of tax herein levied be raised or lowered by the State Board of Equalization, as authorized in Section 1 of this Act, (12434) such increase or decrease shall be added to, or deducted from, that portion of the tax which is levied for the current expenses of state government.

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No. 116

In the Supreme Court of the United States

October Term, 1934.

STATE OF OKLAHOMA, *EX REL.* OKLAHOMA TAX COMMISSION, H. L. McCRACKEN, CHAIRMAN, RAYMOND D. THOMAS AND E. L. RICHARDSON, MEMBERS OF SAID COMMISSION, AND B. B. CONNOR AS SHERIFF OF OSAGE COUNTY, OKLAHOMA, *Petitioners,*

vs.

BARNSDALL REFINERIES, INCORPORATED, THE CARTER OIL COMPANY, CHAMPLIN REFINING COMPANY, *ET AL., Respondents.*

BRIEF OF RESPONDENTS.

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BARNSDALL REFINERIES, INCORPORATED, THE CARTER OIL COMPANY, CHAMPLIN REFINING COMPANY, *ET AL., Respondents.*

BRIEF *of* RESPONDENTS.

Preliminary Statement.

By Act of Congress of June 28, 1906 (34 St. L. 539), known as the "Osage Allotment Act," provision was made, among other things, for the division of the lands belonging to the Osage Tribe of Indians among the members thereof, but by section 3 of such act the oil, gas and other mineral content in all of the land to be allotted was reserved for the benefit of the Osage Tribe for a period of 25 years and such section provided that leases for oil, gas and other min-

eral, covering the allotted lands might be made by the Osage Tribe of Indians through its Tribal Council and with the approval of the Secretary of the Interior and under such rules and regulations as the Secretary might prescribe. Such section 3 is as follows:

> "*Sec. 3.* That the oil, gas, coal or other minerals covered by the lands for the selection and division of which provision is herein made are hereby reserved to the Osage tribe for a period of twenty-five years from and after the eighth of April, nineteen hundred and six; and leases for all oil, gas and other minerals covered by selections and division of lands herein provided for, may be made by the Osage tribe of Indians through its tribal council, and with the approval of the Secretary of the Interior, and under such rules and regulations as he may prescribe; *provided*, that the royalties to be paid to the Osage tribe under any mineral lease so made shall be determined by the President of the United States; and, *provided further*, that no mining of or prospecting for any of said mineral or minerals shall be permitted on the homestead selections herein provided for without the written consent of the Secretary of the Interior; *provided, however*, that nothing herein contained shall be construed as affecting any valid existing lease or contract."

Other sections of the Osage Allotment Act gave Congress the power to extend the period of the reservation of minerals beyond the 25 years provided in the original act and by Act of Congress approved March 3, 1921 (41 Stat. L. 1249), Congress amended section 3 of the Osage Allotment Act so as to extend the time of the reservation of the minerals to April 8, 1946, and by Act of Congress, approved March 2, 1929 (45 Stat. L. 1478), such reservation of minerals was extended to April 8, 1958.

All oil produced in Osage County by respondents or others is produced under oil leases made pursuant to the above mentioned Acts of Congress and the regulations of the Secretary of the Interior pertaining to such leases. Each lease under which respondents or others are producing oil in Osage County has been made by the Tribal Council and approved by the Secretary of the Interior and the leases are being operated in accordance with the regulations of the Secretary pertaining to such operations.

A "Gross Production Tax" Law was passed by the Extraordinary Session of the Fifth Oklahoma Legislature in 1916 (Session Laws Oklahoma, 1916, p. 102). The gross production taxes levied by this act were attempted to be collected on oil produced pursuant to Osage leases. But in *Howard* v. *Oil Companies,* 247 U. S. 503, 62 L. ed. 1239, and in *Large Oil Company* v. *Howard,* 248 U. S. 549, 63 L. ed. 416, this court held that the law was invalid as applied to Osage production. These cases were decided in 1918 and 1919, respectively. Congress, thereafter, in 1921, passed the act approved March 3, 1921 (41 Stats. at L. 1250), the result of which was to permit the Oklahoma Gross Production Tax Law of 1916 to apply to oil produced from Osage lands. It is evident from the language of the permissive act that in giving this consent, Congress had in mind the particular kind of a gross production tax then in effect in Oklahoma. The Gross Production Tax Congress consented to was to be

> "distributed"

and was to be

> "in lieu of all other state and county taxes levied upon the production of oil and gas"

both to be

> "as provided by the laws of Oklahoma."

With reference to distribution of the tax, the 1916 Act provided, in section 5, as follows:

> "The gross production tax provided for in this act is hereby levied and collected for the following specific purposes, to-wit:
>
> "*(1)* For current expenses of state government: Two-thirds.
>
> "*(2)* For and in aid of the common schools of the county from whence the oil or gas and other mineral is produced, one-sixth (five mills).
>
> "*(3)* For and in aid of the construction of permanent roads and bridges of the county from whence the oil or gas and other mineral is produced, one-sixth (five mills)."

This section has been carried forward unchanged in all codifications of the Oklahoma law and is copied in full in the appendix to petitioners' brief at page 29, as section 12445 of the 1931 Code. The "in lieu" provision was contained in section 1 of the 1916 Act, and was, in so far as pertinent here, as follows:

> "The payment of the taxes herein imposed shall be in full and in lieu of all taxes by the state * * * upon leases for mining * * *; and also upon the oil, gas, asphalt or ores bearing minerals hereinbefore mentioned * * *."

This section has been carried forward in all subsequent codifications of the Oklahoma laws and is copied in full in the appendix to petitioners' brief at page 26, as section 12434 of the 1931 Code. The amount and basis of the tax was provided for in section 1. It was to be

> "equal to 3 per centum of the gross value of the production * * *."

The last paragraph of such section 1 provided that if the

gross production tax so levied was greater or less than the general ad valorem tax for all purposes would be on the property, as to which the tax was an "in lieu" tax, then the State Board of Equalization could raise or lower the rate to make the gross production tax conform to what the ad valorem tax would have been if levied. An appeal was permitted from the action of the State Board of Equalization in this regard to the Supreme Court of the State of Oklahoma. In *Shaffer* v. *Carter,* 252 U. S. 37, this court said that the Oklahoma Gross Production Tax was

"a substitute for the ad valorem property tax * * *,"

and this is quite obvious due to the fact that the rate is to be raised or lowered to make the tax the equivalent of an ad valorem tax.

Since passage of the permissive act of Congress, the Oklahoma Gross Production Tax has been regularly collected upon all oil produced in the Osage Nation.

The 1933 Oklahoma Legislature passed an act (Ch. 132 of the Oklahoma Session Laws 1933, p. 301) which it denominated an "Excise tax." It is this law that is in controversy here. It was held below that this act was invalid as applied to oil produced pursuant to the Osage oil leases, because Congress had not consented to such tax. This act is printed in full in the appendix to petitioners' brief, beginning at page 22, except that the title to the act is omitted. Such title is as follows:

"EXCISE TAX ON PETROLEUM.

House Bill No. 483.

An act levying an Excise Tax of one-eighth of one cent per barrel on petroleum oil produced in the State of Oklahoma subsequent to the passage and approval

of this Act; providing for the deposit of the proceeds of such tax in the State Treasury to the credit of the 'Proration Fund' created hereby, and the appropriation of said fund for the payment of salaries and expenses of the proration umpire, his assistant and deputies, and the proration attorney, and for the payment of salaries and expenses of reporters, stenographers, and clerks, and all items of office expense and supplies, as fixed and authorized by the provisions of House Bill No. 481 of the Acts of the Fourteenth Session of the Legislature of the State of Oklahoma; providing for the time and manner of the payment of said tax by the purchaser or producer; providing for penalties and proceedings on delinquencies, and prescribing penalties for the violation of this act; repealing all acts in conflict herewith, and for other purposes and declaring an emergency."

ARGUMENT.

We will present our argument in support of our contention that Congress has not consented to the "excise tax" on oil produced from the Osage lands, under two propositions, as follows:

(1) The Act of 1933 creates an "excise tax" and not a "gross production tax."

(2) If the Act of 1933 is a "gross production tax" it is not the kind authorized by Congress.

And of these in their order:

I.

The Act of 1933 Creates an "Excise Tax" and Not a "Gross Production Tax."

The title of the "excise tax" act which, under the Constitution of Oklahoma, must disclose the nature and subject of the act, defines it as

> "An Act levying an *excise tax* of one-eighth of one cent per barrel on petroleum oil produced in the State of Oklahoma subsequent to the passage of this Act."

Section 1 of the act declares that until June 30, 1935,

> "there is hereby levied an *excise tax* of one-eighth of one cent per barrel on each and every barrel of oil produced in Oklahoma."

Then such act goes on to state:

> "Such *excise tax* of one-eighth of one cent per barrel shall be reported to and collected by the Oklahoma Tax Commission at the time and in the same manner as now provided by chapter 66, article 5, of the Okla-

homa Session Laws of 1931, for the collection of the *gross production tax* on petroleum oil."

It then goes on to state, "on petroleum sold at the time of production the *excise tax* thereon shall be paid by the purchaser," *et cetera.* It is thus seen that the act itself uses the term "excise tax" many times and an examination of the act discloses that the legislature used the right nomenclature when it so described the act. The very section 1, which uses the words

"excise tax"

three times in speaking of the tax levied thereby, uses such term in juxtaposition to the words

"gross production tax."

But it is said that while the tax is denominated an "excise tax" yet, in truth and in fact, it is a gross production tax and that the court will look through the nomenclature to the realities and declare the tax a production tax. This power, of course, the court has. It is usually exercised in the defense of the jurisdiction of the federal courts where state laws by their wording seek to evade a federal question that would give the courts of the United States jurisdiction. It is apparent that the Oklahoma legislature made no effort to camouflage this tax. It very evidently thought it was an excise tax. If it had had in mind production from Osage land and had intended to attempt to make the tax apply to such production, it would probably have named the tax a gross production tax or an additional gross production tax, or embodied this tax as an amendment to the 1916 gross production tax law. Only a small part of the oil that is produced in Oklahoma comes from Osage lands. All production in the Osage is under the supervision of the

Secretary of the Interior and the proration laws of Oklahoma, to defray the expenses of which the excise tax law was passed, could have no operation in the Osage under existing federal law unless the Secretary of the Interior consented thereto. In view of the decisions of the Supreme Court of Oklahoma and of this court, it is probable that the Oklahoma legislature did not expect that the taxing authorities would claim that the excise tax law was applicable to Osage production. At any rate it is certain that the Oklahoma legislature thought it was correctly describing the 1933 tax when it called it an "excise tax." There is nothing whatever in the act to indicate that the Oklahoma legislature was not in absolute good faith in denominating the tax an "excise tax." The power to disregard nomenclature is not exercised to the extent of changing the nature of a tax imposed as declared by the words of the statute unless it is apparent from the face of the statute that the legislature has made a misapplication of the term. Thus in *Flint* v. *Stone Tracy Company,* 220 U. S. 108, the act described the tax as an "excise tax" but it was contended that the act in truth levied a property tax under the guise of an excise tax and this court should look through the words of the act to its real purpose and intent. Answering this contention, the court on page 145 say:

> "While the mere declaration contained in the statute that it should be regarded as a tax of a particular character does not make it such, if it is apparent that it cannot be so designated consistently with the meaning and effect of the act, *nevertheless the declaration of the lawmaking power is entitled to much weight and in this statute the intention is expressly declared to impose a special excise tax.* * * *"

The criterion here set out which enables the court to disre-

gard the express language of a statute and declare the tax to be of a nature different from that set out in the act is that "it is apparent that it cannot be so designated consistently with the meaning and effect of the act." The act levies a specific tax on a specific article or substance for a specific purpose. The tax is not based on value. Value does not enter into the calculation of the tax. The same tax is levied on each barrel of oil, wherever produced in the State of Oklahoma, without regard to its gravity, to its gasoline, or other content. If a barrel of oil produced is worth 50 cents a barrel and a barrel produced in another locality, owing to its gravity and gasoline and other content, is worth $1.00 a barrel, the tax paid on each barrel is the same. The tax levied, when collected, does not go into the general revenues of the state and is not applied to general state purposes, but is only to be applied to the purpose of liquidating the expense of administering the Proration Act of the State of Oklahoma. Thus the act has every earmark, bears every indicia of an excise tax as such tax is defined and individualized in dictionaries and is described, defined and delimited in the opinions of the courts differentiating between excise and other taxes. The legislature was not only right in labeling and declaring the tax levied to be an excise tax, but used the term with precision and the act discloses that the legislative intention was to create for a limited period, an excise tax and not a production tax, discloses that it was the design of the legislators to create a tax that would be in addition to the gross production tax, a tax to be applied to different purposes than the gross production tax, to be handled in a different manner and to be deposited in a different fund from the gross production tax.

As to the kind of tax it was, the court below said (R. 26):

> "In considering this cause, and at the outset, we are met with the question whether this tax of 1/8 of one cent per barrel is or is not an 'Excise Tax.' It was denominated an 'Excise Tax' by the Legislature in the body of the Act levying the tax, and in the title thereto, and while the designation of a tax is not necessarily controlling as to what is the nature and character of the tax, yet this tax is not in any manner based upon the value of the oil taxed applying alike to the most valuable barrel of oil as to the least valuable barrel. This tax is small in amount, and to exist for a limited time only, and for the benefit of a special fund or purpose as distinguished from a general purpose. It therefore bears all the earmarks of an excise tax as distinguished from a property tax, and we conclude that it is in truth and in fact what the Legislature designated it to be, that is, an 'Excise Tax.' *Patton* v. *Brady,* 184 U. S. 608, 46 L. ed. 713; *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 55 Law. ed. 389."

This is a decision of the highest state court on the nature and character of the state statute before it for construction and we think determinative of that question. Nevertheless, the court below further held that even if this tax was a gross production tax, it was not the kind authorized by Congress. Which brings us to:

II.

If the Act of 1933 Is a "Gross Production Tax" It Is Not the Kind Authorized by Congress.

By section 5 of the Act of March 3, 1921 (which is the only Act of Congress authorizing a state tax upon oil produced from Osage lands), Congress consented to a certain kind of tax. There are at least four particulars in which

the "excise tax" fails to meet the requirements. Section 5, is as follows:

> "That the State of Oklahoma is authorized from and after the passage of this act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and *distributed*, and *in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma*, the Secretary of the Interior is hereby authorized and directed to pay through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per centum levied as gross production tax, *to be distributed as provided by the laws of Oklahoma; Provided*, that the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, *an additional sum equal to 1 per centum of the amount received by the Osage tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein; Provided, further*, that the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only." (Italics ours.)

The four requirements which are necessary in order to comply with the conditions laid down by Congress to permit application of the tax are the following:

(1) There must be only one "gross production tax." Not two or more.

(2) The tax must be distributed—that is, it must go to several purposes and not to only one.

(3) The tax must be "in lieu of all other state and county taxes levied upon the production of oil."

(4) It must be a per centum tax upon the value of the oil—the equivalent of an ad valorem tax upon the leasehold, equipment and production—not a flat tax per barrel.

All of these are lacking in the "excise tax." We will discuss them in their order:

(1) *There must be only one "gross production tax." Not two or more.*

Congress consented to "a gross production tax." It did not consent to gross production *taxes.* This court had held in 1918 and 1919 that the Oklahoma Gross Production Tax Law of 1916 was invalid as applied to Osage oil production *(Howard* v. *Oil Companies; Large Oil Company* v. *Howard, supra).* Congress very apparently, as a result of the decisions just cited, intended to consent that the 1916 Act apply to oil produced from Osage lands. At any rate it did not consent to several gross production taxes. It gave permission to levy one tax. It did not consent to two. Two or more gross production taxes are not comprehended in the words,

"a gross production tax."

If these words include two taxes then they include any number. It is not likely that Congress intended to consent to several taxes. The oil leases upon lands in the Osage Nation are made upon terms prescribed by the Secretary of the Interior. They provide for a royalty of 1/5 of the oil produced if the wells on the lease average 100 barrels or more. If the average is less than 100 barrels, the royalty is 1/6. The royalty provided for in commercial leases is uniformly 1/8. Osage leases would be more desirable if production therefrom was not subject to taxation. Congress

might well have had this in mind in consenting to taxation of Osage production. But Congress was quite liberal in this enactment. It not only authorized the State of Oklahoma to levy and collect the customary gross production tax but, in addition, it directed the Secretary of the Interior to pay through the proper officers of the Osage Agency at Pawhuska, Oklahoma,

> "an additional sum equal to one per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein."

Osage County is the only county in Oklahoma which receives a benefit of this kind. The tax authorized by Congress was such a one as would be "in lieu of all other state and county taxes levied upon the production of oil and gas." Necessarily, there could be only one such tax. If a tax is to be "in lieu" of all others there could be only one tax.

Congress clearly intended to consent to only one tax and that was to be in accordance with certain specifications. One of these was:

(2) ***The tax must be distributed—that is, it must go to several purposes and not to only one.***

The "excise tax" is not to be "distributed." All the money collected is to go to one purpose. All money collected must go in a "separate and distinct fund to be known as the 'Proration Fund'." The permissive Congressional Act requires of the gross production tax authorized to be levied and collected, that it be "distributed * * * as provided by the laws of Oklahoma." In passing the permissive act Congress undoubtedly had in mind the

Act of 1916 which this court had held invalid as applied to Osage production. It was undoubtedly the tax prescribed by the 1916 Act, or certainly a tax of that kind, which Congress had in mind. The 1916 Act required the tax to be "levied and collected for the following specific purposes":

> "*(1)* For current expenses of state government: Two-thirds.
>
> "*(2)* For and in aid of the common schools of the county from whence the oil or gas and other mineral is produced, one-sixth (five mills).
>
> "*(3)* For and in aid of the construction of permanent roads and bridges of the county from whence the oil or gas and other mineral is produced, one-sixth (five mills).",

and the State Auditor, whose duty it was to collect the tax, was directed to make distribution accordingly. So we say that when Congress required that the gross production tax it authorized must be one that would be distributed in accordance with the laws of the State of Oklahoma, it meant a tax which would be used for the general expenses of state government, common schools and roads and bridges.

But the excise tax is not to be "distributed." The word "distribute" means, according to Funk and Wagnall's Dictionary, the following:

> "To give out or divide among a number; share or parcel out; dispense; apportion; as to distribute alms."

This is the definition used in legal decisions. In *Young* v. *Sinsabaugh,* 173 N. E. 784 (Ill.), appears the following:

> "The definition of the word 'distribute' as found in Webster's New International Dictionary is to divide among several or many; to deal out; apportion; allot. In the Century Dictionary, the definition is to divide or parcel out; allot in shares; bestow in parts or shares,

or in due proportion; apportion; divide among several; as, Moses distributed lands to the tribes of Israel."

The "excise tax" of 1/8 of one cent a barrel is not to be distributed. All funds derived from the tax are to be placed in "a separate and distinct fund to be known as the 'Proration Fund'." And all money derived is to be expended in administration of the proration laws. This is covered by section 2 which in part provides:

"PRORATION FUND—USE OF MONEY CONSTITUTING.

Section 2. All funds derived from the levy of the tax of one-eighth of one cent per barrel on petroleum oil produced in the State of Oklahoma shall be deposited in the State Treasury to the credit of a *separate and distinct fund* to be known as the 'Proration Fund.' All moneys in said fund are hereby appropriated, and shall be used for the payment of salaries and expenses"——

of the proration umpire, etc.

The majority opinion of the court below quite adequately covered the point we have been attempting to make. It said (R. 27):

> "The money collected for gross production tax is distributed two-thirds for current expenses of state government, and the remaining one-third is distributed one-half to the common schools of the county where the oil is produced, and one-half in aid of the construction of permanent roads and bridges of the county where the oil is produced, while the money collected for the one-eighth of one cent excise tax is not distributed in general over the state, nor is any of it restricted to or required to be expended in the county where the oil is produced, but on the contrary, this money goes into the 'proration fund' and is used to pay expenses of maintaining and enforcing proration only in and for those pools or common sources of supply of oil where the conditions are such that the full production

of oil from that common source of supply cannot be taken without constituting waste. Considering the differences in the method of levying of the gross production tax and the excise tax here under consideration and the different method of distribution of the gross production tax collections and the excise tax collections, Congress might well have consented to the imposition of the gross production tax in the language above quoted from the Congressional Act, without having any inclination or intention of consenting to the imposition of such a tax as the excise tax here under consideration. As regards the matters here under consideration, the duty, purpose and policy of the United States Government was to look after and provide for the general well being of the Osage Indians, and provide for the care and protection of their property. The Congress might well have observed and considered the benefits that would be received by the Osage Indians in Osage County, Oklahoma, by the collection of the gross production tax and the expenditure thereof in the method and for the three purposes provided in that act. The same federal authority might not observe such benefits as would justify the government in consenting to this excise tax on the oil produced from the Osage Indian lands. This proration fund may or may not be expended in Osage County. There may be but few common sources of supply in Oklahoma to which the proration law would apply, in which event all collections of this excise tax would be used in the enforcement of the proration law in and for those pools or sources of supply which come within the provisions of the proration law. Such pools or sources of supply may of course decrease in number and may be far removed from the Osage Indian lands. The enforcement of this act, however beneficial to those common sources of supply where it is applicable, and however beneficial indirectly in and to other oil fields, might or might not in the opinion of governmental authorities be beneficial to the wards of the government, the Osage Indians.

The Congress might or might not consent to the levy and collection of this excise tax.

"Congress might have withheld consent to the levy and collection of any state tax on these government instrumentalities. The State of Oklahoma thus far has withheld consent to the collection of federal taxes on similar state instrumentalities, and the objections to such federal taxes as constituting burdens on state instrumentalities has been sustained. *Burnett* v. *Coronada Oil & Gas Co.*, 285 U. S. 393, 76 Law. ed. 815."

It seems clear that the "excise tax" does not meet the requirement of Congress that the tax be "distributed." It falls equally short in another particular, which is:

(3) *The tax must be "in lieu of all other state and county taxes levied upon the production of oil."*

The congressional act required that the permitted tax must be

"in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma."

There is no "in lieu of" provision in the "excise tax." The tax it levied was in addition to the tax upon value levied by the 1916 Act. It is, therefore, without the language of and in opposition to, a requirement of the permissive act.

The dissenting opinion below did not advert to the "in lieu of" requirement. Nor do petitioners in their brief. It seems to us absolutely decisive.

At the time the permissive act was passed, and at the time the "excise tax" law of 1933 was enacted, the Oklahoma Gross Production Tax Law of 1916 was in effect. It levied a tax equal to

"3 per centum of the gross value of the production of petroleum * * *,"

which was provided in the act to be

"in full and in lieu of all taxes by the state * * * upon any property rights attached to or inherent in the right to said minerals * * *; *and also upon the oil* * * *."

This gross production tax of 1916 was based upon value and was to be "in lieu of" all other taxes upon, among other things, the oil produced. The "excise tax" of 1/8 of 1 cent per barrel is not a tax based upon value. Each barrel of oil is taxed at the same rate without regard to value. In Oklahoma the price of oil per barrel varies according to its gravity. The lowest gravity covered in the posted prices of the purchasing companies is 25 degrees and the highest 40 degrees, and there is a differential of 2 cents per barrel for each degree of gravity from the lowest to the highest. The tax of 1/8 of 1 cent per barrel is an entirely different kind of tax than provided by the 1916 Act which levied a tax equal to

"3 per centum of the gross value."

Congress authorized a single tax upon Osage oil production which was to be "in lieu of" all others as provided by the laws of Oklahoma. Since the excise tax does not purport to be exclusive of other taxes upon production of oil, how can it be held that Congress consented to it? It is an additional tax and is not "in lieu of" any other tax. Surely Congress consented to only one tax. If the tax of 1/8 of 1 cent per barrel operates it must be in lieu of all other taxes "upon production" and it would result that the per centum tax on value would become inoperative. Petitioners say in their brief that the excise tax is merely "an addi-

tional gross production tax." But if it is that does not help any. On the contrary, it clearly puts them out because Congress consented to only one tax, since the tax it authorized was required to be "in lieu of" all other taxes levied by the state upon the production of oil. The tax of 1/8 of 1 cent per barrel is a tax "upon the production of oil." It is not "in lieu of" the per centum tax upon the value of the oil. Hence, it is not permitted to apply to Osage oil because it does not meet the condition imposed by Congress that such a tax upon production must be "in lieu of" all others.

The meaning of the words "in lieu of" has been judicially construed many times. In *Hunter* v. *City of Memphis*, 26 S. W. 828 (Tenn.), a statute required payment by insurance agents of a privilege tax which was provided to be "in lieu of all other taxes." As to the meaning of the quoted words the court said such privilege tax

> "is a positive exclusion of every other privilege tax. The phrase has no other office or meaning."

So here the value tax which contains the "in lieu of" provision is a "positive exclusion of" the "excise tax."

The "excise tax" does not meet one of the prerequisites which Congress laid down that the tax must be

> "in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma."

There is still another respect in which the 1/8 of 1 cent per barrel tax does not come within the specific restrictions or qualifications imposed by the Act of Congress. It is:

(4) ***It must be a per centum tax upon the value of the oil—the equivalent of an ad valorem tax upon the leasehold, equipment and production—not a flat tax per barrel.***

Prior to the passage of the permissive act of March 3, 1921, this court decided *Shaffer* v. *Carter, supra* (March 1, 1920). In the opinion in such case this court said that the Oklahoma Gross Production Tax Law of 1916 was intended

"as a substitute for the ad valorem property tax."

In essence the law of 1916 is a property tax, is in effect an ad valorem tax on the mineral interest in the land, the production therefrom as produced, and the equipment necessary to produce it, procured by a percentage tax upon the value of the gross production. This for the reason that such act provides for adjustment of the percentage rate upon the value of the production so as to conform in result to what would be paid upon an ad valorem basis. This is covered in section 1 of the act, as follows:

> "The State Board of Equalization, upon its own initiative, may and upon complaint of any person who claims that he is taxed too great a rate hereunder, shall, take testimony to determine whether the taxes herein imposed are greater, or less than the general ad valorem tax for all purposes would be on the property of such producer subject to taxation in the district or districts where the same is situated, including the value of oil, gas or mineral lease, or of the mining or mineral rights, the machinery, equipment or appliances used in the actual operation of, in and around any such well or mine, the value of the oil, gas, asphalt or any of the said mineral ores produced and any other element of taxable value in lieu of which the tax herein is levied. The said board shall have power and it shall be its duty to raise or lower the rates herein imposed to conform thereto."

In passing the permissive act, Congress undoubtedly (as is shown by the contents of the act) was familiar with the provisions of the Oklahoma Gross Production Tax Law of 1916. It was to permit operation of such tax law that the permissive act was passed. When, in the act, Congress consented to the levy by Oklahoma of "a gross production tax" to be "distributed" and to be "in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma," it must have had in mind specifically the method of distribution, the "in lieu of" feature and the other provisions of the 1916 Act. It, therefore, knew that the 1916 law provided for a percentage tax upon gross value. It is presumed to have known of this court's decision in *Shaffer* v. *Carter, supra,* wherein it was said that this gross production tax was intended "as a substitute for the ad valorem property tax." It knew that in effect the tax was a property tax. By the very terms of the 1916 Act the tax was one based upon value. Congress knew that. So Congress consented to the kind of tax embodied in the 1916 Act—a tax on value and a substitute for the ad valorem tax. The Act of 1933 imposing a tax of 1/8 of 1 cent per barrel does not fit in as a tax upon value or as a substitute for the ad valorem property tax. It does not take the value of the oil into consideration. It is a tax per barrel without regard to quality or value. It is not the kind of a tax which was consented to by Congress. The tax consented to imports a tax upon value, the equivalent of an ad valorem tax and containing a provision authorizing the lowering or raising of the per centum of value rate to make the amount collected conform to what would be realized from an "ad valorem tax for all purposes." If the tax levied by the "excise tax" law, in addition to the per centum

of value tax, exceeded the value of the mineral rights, *et cetera*, there would be no means whereby the tax could be reduced to make the taxes the equivalent of the ad valorem rate.

Summarizing our argument under Heading II, we say that Congress did not consent to the tax of 1/8 of 1 cent per barrel, because such tax is not an exclusive tax in lieu of all others. Because it is not to be "distributed" but must be devoted to the expenses incurred for a particular purpose, and because it is not a per centum tax on value, the equivalent of an ad valorem tax with provision for adjusting the rate to conform to the ad valorem rate—but is laid without regard to value.

Conclusion.

Congress was quite liberal in the permissive act of March 3, 1921. At that time much of the land of the Osage Indians had not been leased for oil. Congress realized, of course, that when leases on the unleased lands were sold, they would bring more money to the Osage Tribe if the oil produced therefrom would not be subject to the Oklahoma Gross Production Tax Law. It deprived the Indians of this benefit for the advantage of the state generally and Osage County. It not only permitted application of the gross production tax, but directed the Secretary of the Interior to cause to be paid "an additional 1 per cent of the amount received by the Osage Tribe of Indians as royalties" to Osage County, Oklahoma, for the construction and maintenance of roads and bridges.

A state cannot tax a federal agency at all without the consent of Congress. It has no power at all, of itself, in

that regard. So, of course, there is no presumption in favor of such taxing power of the state. Permission to tax must be found in some Act of Congress. We think the majority opinion in the court below was absolutely correct wherein it says (R. 28):

> "Our state should freely act in the levy and collection of a tax on national governmental instrumentalities, which is consented to by the National Government, but we should be slow to presume upon consent given, and careful to remain within the limits of the acquiescence or the consent heretofore given, and we should not create or presume the right to levy and collect one tax because the National Government has consented to the levy and collection of another and a different tax. Under the permissive Act of Congress we have levied and collected the gross production tax which was authorized and permitted, and further than that we cannot go with other taxes until and unless that government should itself extend the consent and permission heretofore granted. That governmental consent cannot be extended or enlarged upon by the state legislature, and should not be by this court."

In petitioners' brief and in the dissenting opinion in the court below reference is made to *Gypsy Oil Company* v. *Oklahoma Tax Commission,* 6 Fed. Supp. 6. We think the mind of the court there was chiefly centered upon the question of jurisdiction and that it only incidentally considered the merits.

Congress consented to the collection of "a gross production tax," of a certain kind. It did not consent to the tax of 1/8 of 1 cent per barrel because it is of another and different kind. The excise tax was a temporary tax. A decision here will have no application outside of Oklahoma. We respectfully submit that the decision of the court below

was obviously correct and that the application for writ of *certiorari* should be denied.

Respectfully submitted,

EDWARD H. CHANDLER,
JAMES B. DIGGS,
R. W. GARRETT,
WM. H. ZWICK,
L. G. OWEN,
Counsel for Respondents.

JOE DICKERSON,
Of Counsel.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 116.—October Term, 1935.

State of Oklahoma ex rel, Oklahoma Tax Commission, H. L. McCracken, Chairman, et al., Petitioners,
vs.
Barnsdall Refineries, Inc., The Carter Oil Company, Champlin Refining Company, et al.

On Writ of Certiorari to the Supreme Court of the State of Oklahoma.

[January 6, 1936.]

Mr. Justice Stone delivered the opinion of the Court.

This case presents the single question whether an Oklahoma tax of ⅛ of a cent per barrel on oil produced in the state, c. 132, Oklahoma Session Laws, 1933, when applied to oil produced by lessees of lands of the Osage Tribe of Indians in Osage County, Oklahoma, is within the congressional enactment consenting to a state tax upon the production of such oil. The challenged tax is paid into the State Treasury and used to defray the expenses of administering the State Oil and Gas Proration Law. The Oklahoma Supreme Court held that the tax is not within the congressional consent and accordingly enjoined its collection as imposing an unconstitutional burden on the Indian leases, which are deemed to be instrumentalities of the federal government. 171 Okla. 145. We granted certiorari, — U. S. —, to review the judgment of the state court, the case being of public importance because involving relations of the state to the national government.

The Oklahoma legislature, by Act of February 14, 1916, c. 40, Okla. Session Laws, 102, imposed a production tax of 3% of the gross value of all oil produced within the state. The Act provides that the tax shall be in lieu of all other taxes upon oil in place in the ground, oil leases, or equipment used for oil production, and that one-third of the tax collected in each county shall be returned to it for the construction of permanent roads and bridges and "for and in aid of" the common schools. The levy is denominated by the taxing act a "gross production tax," a label which this Court

and the Supreme Court of Oklahoma have accepted as appropriate. *Gillespie* v. *Oklahoma*, 257 U. S. 501, 504; *Barnsdall Refineries, Inc.* v. *Oklahoma Tax Commission, supra*, 147.

In *Howard* v. *Gypsy Oil Company*, 247 U. S. 503, and *Large Oil Co.* v. *Howard*, 248 U. S. 549, this tax was held invalid so far as applied to the production of oil by lessees of lands of the Osage Tribe of Indians, which were located in Osage County, as a tax burden upon instrumentalities of the United States. See *Indian Territory Illuminating Oil Co.* v. *Oklahoma*, 240 U. S. 522; *Gillespie* v. *Oklahoma, supra*; compare *Group No. 1 Oil Corporation* v. *Bass*, 283 U. S. 279; *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393.

These decisions were followed by the Act of Congress of March 3, 1921, 41 Stat. 1250, Section 5[1] of which authorized the State of Oklahoma to levy a tax upon the gross production of oil in Osage County, with the proviso that ". . . all taxes so collected shall be paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, ..." Other sections of the act permitted the extension, by an additional twenty-five years, of the period, expiring in 1931, for which mineral leases of the lands of the Osage Indians might be granted by the Secretary of the Interior acting in their behalf.

Congress, in enacting the legislation, was advised of the Oklahoma 3% gross production tax, of the decisions of this Court holding lessees of Indian oil lands, which were located in Osage County, immune from the tax, and that removal of the immunity would benefit the Osage Indians through the return of one-third of the

[1] "Sec. 5. That the State of Oklahoma is authorized from and after the passage of this Act to levy and collect a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and all taxes so collected shall be paid and distributed, and in lieu of all other State and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to the State of Oklahoma, from the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, the per centum levied as gross production tax, to be distributed as provided by the laws of Oklahoma: *Provided*, That the Secretary of the Interior is hereby authorized and directed to pay, through the proper officers of the Osage Agency, to Osage County, Oklahoma, an additional sum equal to 1 per centum of the amount received by the Osage Tribe of Indians as royalties from production of oil and gas, which sum shall be used by said county only for the construction and maintenance of roads and bridges therein: *Provided further*, That the proper officials of Osage County shall make an annual report to the Secretary of the Interior showing that said fund has been used for road and bridge construction and maintenance only."

tax to the county. See Hearings before Committee on Indian Affairs, S. 4039 (particularly letters of the Secretary of the Interior and of the Indian Commissioner to the Chairman of the Committee), Part 1, pp. 7, 8; Part 2, pp. 108, 109; Report Senate Committee on Indian Affairs, No. 704, 66th Cong., 3rd Sess. As originally introduced the bill authorized the levy of a gross production tax upon oil produced in Osage County "not to exceed 3 per centum of the value of the same", and directed that it should be "distributed as now provided by the laws of Oklahoma." With the evident purpose of removing the 3% limit but not of otherwise altering the character of the permitted tax, the 3% limitation was stricken from the bill before enactment.

Congress, in removing the tax immunity, thus had in contemplation the particular tax then on the statute books of Oklahoma, then and ever since described as a gross production tax, the benefits of which would inure to Indians in Osage County by the distribution of a part of the tax to that county. The section bears its own evidence of the intention that the waiver of tax immunity of the production of oil from Indian lands was to be limited to a tax having these characteristics. The tax is described as a gross production tax. It is to be "paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, . . ." The reference must be taken to be to the laws then in effect, unless we are to indulge the improbable assumption that the state was to be left free to dispense with the requirement that the tax permitted was to be in lieu of all other taxes. This conclusion seems inescapable, despite the amendment of the bill as introduced by dropping the word "now" from the direction that the tax is to be "distributed as now provided by the laws of Oklahoma," since in the section as amended the phrase is used to qualify the "lieu" provision of the statute as well as the payment and distribution provisions. The section removing the immunity thus described the gross production tax then on the statute books, which was by the taxing act declared to be in lieu of all other taxes upon the oil leases, with which Congress was particularly concerned. Moreover, the Secretary is directed to pay from Indian funds "the per centum" levied as a gross production tax "to be distributed as provided by the laws of Oklahoma" and to pay to the county for road and bridge construction "an additional sum" equal to one

per cent of the oil royalties received upon the Osage Indian leases, the latter sum evidently being in addition to the amounts to be received by the county upon distribution of the gross production tax.

We think that the cumulative effect of the words of the section, obscure until read in the light of its history and of the situation to which it applied, is persuasive that the permitted tax is, as was the then existing tax, one to be measured by the gross value of the oil produced, and to be distributed in part to the counties and thus to be of benefit to the Indian owners of lands in Osage County.

In these particulars the tax of ⅛ of a cent per barrel of oil produced does not conform to the congressional consent. The taxing act does not, as required by the permissive Act, levy a per centum gross production tax in terms of value, and, more important, it provides that the entire tax levied for the period from the effective date of the Act of 1933 to June 30, 1935, is to be used to pay the expenses of state officials authorized by the state "proration law" to apportion and control oil and gas production in such manner as to prevent waste by producers drawing from a common source or pool. No part of the proceeds of the tax is required to be paid to the counties, and the benefits of proration depending upon the existence of a common source drawn upon by different producers, would not necessarily extend to any particular county.

The Supreme Court of Oklahoma emphasized the fact that the ⅛ of a cent per barrel tax, denominated by the statute an "excise", is an excise tax distinguishable from a property tax in lieu of which the gross production tax is levied, and different from the gross production tax in its temporary character and the method of its computation and distribution, and so concluded that it is not a tax contemplated by the congressional consent. Construing that consent with the strictness appropriate to the interpretation of a waiver of a defined tax immunity of the sovereign, we think the conclusion of the state court was right.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

CLERK'S COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 151

ISAAC CHAPMAN, PETITIONER,

vs.

R. J. HOAGE, DEPUTY COMMISSIONER, DISTRICT OF COLUMBIA COMPENSATION DISTRICT, U. S. EMPLOYEES' COMPENSATION COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

PETITION FOR CERTIORARI FILED JUNE 21, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 151

ISAAC CHAPMAN, PETITIONER,

vs.

R. J. HOAGE, DEPUTY COMMISSIONER, DISTRICT OF COLUMBIA COMPENSATION DISTRICT, U. S. EMPLOYEES' COMPENSATION COMMISSION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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[fol. 1] [Caption omitted]

IN SUPREME COURT OF THE DISTRICT OF COLUMBIA.

Holding an Equity Court

Equity

No. 57401

ISAAC CHAPMAN, Plaintiff,

vs.

R. J. HOAGE, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission, Defendant

BILL FOR MANDATORY INJUNCTION

Filed July 11, 1934

The bill of complaint of the plaintiff respectfully shows to the Court as follows:

1. That the plaintiff is an adult citizen of the United States and a resident of the District of Columbia and brings this suit in his own right.

2. That the defendant, Robert J. Hoage is a citizen of the United States and is sued as Deputy Commissioner for the District of Columbia Employees' Compensation Commission.

3. That said plaintiff was on, to-wit, the 15th day of December, 1928, and for eight months prior thereto, in the continuous employ of the Palais Royal, Inc., a corporation, as a "helper" on a delivery truck operated by said corporation.

4. That during the time of plaintiff's employment aforesaid the said Palais Royal, Inc., a corporation, was subject to an Act of Congress, approved May 17, 1928, entitled "An Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes" and that the

liability of the said Palais Royal, Inc., a corporation, as employer, for compensation under said Act was insured by the Indemnity Insurance Company of North America.

[fol. 2] 5. That while so employed by the Palais Royal, Inc., as aforesaid on, to-wit, December 15th, 1928, the plaintiff was riding on a truck belonging to the employer when the said truck collided with a street car of the Washington Railway and Electric Company causing the truck in which the claimant was riding to turn over, and as a result thereof the plaintiff suffered severe cuts and bruises on the head and the toes on one foot were crushed.

6. That on the 10th day of June, 1929, the plaintiff filed with the defendant a notice on a form prescribed by the United States Employees' Compensation Commission, of his election to sue the Washington Railway and Electric Company, the third party, and that in filing said form the plaintiff made claim for any deficiency between the amount recovered from the Washington Railway and Electric Company and the amount to which he might be entitled under the said Compensation Act, thereby protecting his rights against the statutory limit as provided in said Act.

7. That on the 18th day of July, 1929, the plaintiff instituted suit against the Washington Railway and Electric Company, a corporation, Law No. 76,949, that on the trial of the issues in said case the plaintiff obtained a verdict of Three Thousand Dollars ($3,000.00) against said third party, which said judgment was reversed by the Court of Appeals, and in which last mentioned judgment the plaintiff sought a review in the Supreme Court of the United States, which plaintiff says was denied; that said case was returned to the Supreme Court of the District of Columbia, for further proceedings.

8. That on March 1, 1934, application was made of the defendant by the plaintiff for compensation for disability [fol. 3] under the compensation Act, (Exhibit A) and the employer after due notification filed with the defendant an answer, a copy of which is annexed hereto marked "Exhibit B", and prayed to be prayed as a part hereof. Thereafter on the 26th day of April, 1934, a hearing was held, at which time objection was made to the hearing by the attorney appearing for the employer on the grounds that the case of

the plaintiff against the third party had not been concluded and the defendant was without jurisdiction. Thereupon the hearing was continued infefinitely.

9. That said plaintiff through his attorneys, on the 3rd day of May, 1934, filed a motion for leave to proceed further in the Supreme Court of the District of Columbia, Law No. 76,949, without the payment of cost, (Exhibit C), alleging his indigency and inability to pay accrued Court cost. Thereafter on the 9th of May, 1934, said motion came on for hearing before Mr. Justice Bailey, who refused to grant the same but advised counsel for said plaintiff that by dismissing said law suit, the claim of this plaintiff could properly and legally be considered by the defendant.

10. Thereupon said plaintiff being unable to proceed further with said cause to a final disposition of the same, on advice of and through his attorneys, discontinued said action against said third party.

11. That after application made, another hearing was held on the 8th day of June, 1934, before the defendant, and testimony taken as to the extent and character of said plaintiff's injuries and the degree of incapacity and disability during the period between the date of the accident and the date of this hearing.

12. As a result of said hearing the defendant filed a compensation order on June 27, 1934, rejecting the claim of the plaintiff, a copy of which is annexed hereto marked "Exhibit D" and prayed to be read as a part hereof.

[fol. 4] 13. The Plaintiff is informed and believes and expects to prove that the defendant erred in his conclusions from the facts, as found by him in the law applicable thereto and in the order based thereon as follows:

(a) In finding that the plaintiff had abandoned his suit against the third party.

(b) In finding that the suit of the plaintiff against the third party was dismissed because of failure on the part of the plaintiff to prosecute.

(c) In finding that the plaintiff having filed his election to pursue his remedy against the third party failed to pursue it against said third party to completion.

(d) In finding that the rights of the employer had been prejudiced by any act of commission or omission on the part of the plaintiff.

(e) In finding that the plaintiff allowed the statutory limit to run against any rights the employer might have had.

(f) In not applying in favor of the plaintiff the presumption accorded him under Section 20(a) of said Act.

(g) In finding that the claimant was not entitled to compensation within the meaning of said Act.

(h) In failing to make a finding for the plaintiff on the whole case and failing to accord him compensation.

Wherefore, in consideration of the premises, plaintiff prays:

1. That a writ of subpœna be issued by this Court against said defendant, Robert J. Hoage, as said Deputy Commissioner, requiring him by a day certain to be therein named, to appear and answer the exigencies of this bill of complaint.

2. That the proceedings before said Deputy Commissioner be reviewed by this Court as to the conclusion of law therein [fol. 5] contained, and as to the facts and conclusions of fact that may be within the jurisdiction of this court; and that a proper decree be granted plaintiff as he may in law be entitled.

3. That an injunction issue out of this Court requiring the defendant to set aside the Compensation Order of June 27, 1934, and to proceed to award compensation to the plaintiff within the terms of the Act and pursuant to the record of testimony in this cause.

4. For such other and further relief as to the Court may seem meet and proper.

Isaac Chapman, Plaintiff; Harlan Wood, J. P. Donovan, Attorneys for Plaintiff.

Duly sworn to by Isaac Chapman. Jurat omitted in printing.

Let this petition be filed without prepayment of costs.
7/11/34. O. R. Luhring, Justice.

[fol. 6] PLAINTIFF'S EXHIBIT "A"

March 1, 1934.

Employees' Compensation Commission,
Ouray Building,
Washington, D. C.

Attention Mr. Cochran.

DEAR MR. COCHRAN:

Reference is made to the claim of Isaac Chapman, who was injured on December 15, 1928, at the intersection of 4½ Street and Main Avenue, S. W.

July 18, 1929, Isaac Chapman brought suit in the Supreme Court of the District of Columbia, against the Washington Railway and Electric Company, Law No. 76,949. A trial was had and a judgment based upon a verdict of a jury, of $3,000.00 was obtained by Chapman.

The defendant appealed to the Court of Appeals of The District of Columbia, case No. 57,39. On May 8, 1933, the Court of Appeals reversed the judgment of the Supreme Court in favor of Chapman. In due season, an application for a Writ of Certiorari was made to the Supreme Court of the United States for the purpose of reversing the judgment of the Court of Appeals. On October 9, 1933, the Supreme Court of the U. S. denied Chapman's application for Writ of Certiorari, thereby affirming the judgment of the Court of Appeals. Consequently, Chapman has not received any compensation whatsoever, although, I may say that he is still unable to work due to the injuries he received in the accident.

At the time of the accident, Chapman was receiving $18.00 per week as an employee of the Palais Royal, Incorporated.

On behalf of Chapman under the appropriate provisions of the Workman's Compensation Act, application is hereby made for compensation under the same, in view of the fact that in his proceedings in Court, no recovery has been had.

Respectfully submitted, Harlan Wood.

[fol. 7] PLAINTIFF'S EXHIBIT "B"

Leave This Space Blank

Case No. ——.
Insurance Carrier's No. ——.

Form DCCA-315.

District of Columbia Workmen's Compensation Act

Office of Deputy Commissioner,

Washington, D. C.

Answer of Employer or Insurance Carrier to Employee's Claim for Compensation

ISAAC CHAPMAN, Claimant

vs.

PALAIS ROYAL, INC., Employer

Indemnity of N. A., Insurance Carrier

The employer or insurance carrier above named for answer to the claim respectfully shows:

1. It is admitted that claimant sustained an injury on or about the date set forth in the claim.

2. It is admitted that both the employer and employee were subject to the District of Columbia Workmen's Compensation Act at the time of the alleged injury.

3. It is admitted that the relationship of employer and employee existed at the time of the injury.

4. It is admitted that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

5. It is admitted that due notice of injury was given employer.

6. It is denied that claimant was permanently disabled to the extent stated in claim.

7. It is denied that claimant was disabled for the period stated in claim.

8. It is admitted that the rate of wages as set forth in claim is correct.

9. —— ——.

[fol. 8] Frost, Myers & Towers. Signed by —— ——.

Note: The employer or insurance carrier should answer the claim within ten days from the date that a copy of it is served upon him. The original answer should be mailed to the de-uty commissioner and a copy thereof served upon the claimant either personally or by mailing to the address in the claim.

PLAINTIFF'S EXHIBIT "C"

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Law

No. 76,949

ISAAC CHAPMAN, Plaintiff,

vs.

WASHINGTON RAILWAY & ELECTRIC CO., Defendant

Motion for Permission to Proceed Further in the Above Entitled Cause

Comes now the plaintiff, Isaac Chapman, by his attorneys of record and moves the Court for permission to proceed further in the above entitled cause without the payment of accrued or further costs and states as cause therefore as follows; that the plaintiff secured a judgment in this Court on the issues raised herein and that said judgment was set aside by the Court of Appeals of the District of Columbia and the case remanded to this Court for further proceedings; that under the opinion as handed down by the Court of Appeals, said plaintiff would be stopped from obtaining a judgment in his favor in any future proceedings; that at the time of the injury complained of in the declaration filed herein, the plaintiff was covered by and subject to the provision of the Workman's Compensation Act in force in and for the District of Columbia; that since the action of the Court of Appeals, he has filed claim for compensation under [fol. 9] the provisions of the Act hereinbefore referred to

with the Deputy Commissioner of the United States Compensation Commission in and for the District of Columbia; that at a hearing held before said Deputy Commissioner on the 26th day of April, 1934, it was held that said palintiff herein had not exhausted his remedy at law and that accordingly, the Commissioner was without jurisdiction to proceed with an adjudication of his claim until such time that this suit was finally terminated; that as a result of the injuries complained of by the plaintiff, resulting from the accident on which this action was predicated, he had been unable to be employed for any length of time and that during said period, he has earned less than $100.00; said plaintiff is still incapacitated and is unemployed and is without funds with which to pay the costs that have accrued in this action or any future costs as stated in the affidavit of the plaintiff appended hereto; that for the purpose of having this cause determined as a matter of record, your plaintiff prays for permission to proceed as hereinbefore stated.

—— ——, —— ——, Attorneys for Plaintiff.

Service of copy of foregoing motion acknowleged this — day of May, 1934.

—— ——, —— ——, Attorneys for Defendant.

[fol. 10] PLAINTIFF'S EXHIBIT "D"

United States Employees' Compensation Commission
District of Columbia Compensation District

Compensation Order—Rejection of Claim.

Case No. 285-14

In the Matter of the Claim for Compensation Under the District of Columbia Workmen's Compensation Act

ISAAC CHAPMAN, Claimant

vs.

THE PALAIS ROYAL, INC., Employer

INDEMNITY INSURANCE COMPANY OF N. A., Insurance Carrier

Such investigation in respect to the above-entitled claim having been made as is considered necessary and a hearing

having been duly held in conformity with law, the Deputy Commissioner makes the following:

Finding of Fact

That on the 15th day of December, 1928, the claimant above-named was in the employ of the employer above-named whose address is 11th and G Streets, Northwest, Washington, District of Columbia; that the employer was subject to the provisions of an Act of Congress approved May 17, 1928, entitled an "Act to provide compensation for disability or death resulting from injury to employees in certain employments in the District of Columbia and for other purposes"; that the liability of the employer for compensation under the said Act was insured by the Indemnity Insurance Company of North America; that on said date the claimant herein while in the employ of the employer above named as a helper on a truck sustained personal injury which arose out of and occurred in the course of his employment and resulted in his disability; that while the claimant was so employed he was riding on a truck be- [fol. 11] longing to the employer when the said truck collided with a street car of the Washington Railway and Electric Co., causing the truck in which the claimant was riding to turn over; that as a result thereof the claimant suffered severe cuts and bruises on the head and the toes on one foot were crushed; that on the 10th day of June, 1929, the claimant herein filed with the Deputy Commissioner notice on a form prescribed by the Commission of election to sue the third party; that in filing said form the claimant made claim for compensation for any deficiency between the amount recovered from the third party and the amount to which he might be entitled under the compensation act, thereby protecting his rights against the statutory limit as provided in Section 13 of the Act; that the claimant pursued his rights of election in the Supreme Court of the District of Columbia and the case was carried from there to the Court of Appeals where the claimant's contention was denied; that a writ of certiorari was applied for and denied by the Supreme Court of the United States; that the claimant then appeared before the Deputy Commissioner by counsel and made request for a hearing and made formal claim for compensation under the provisions of the compensation act, and the Deputy Commissioner was advised by the attorney for the claimant on March 1, 1934,

that application was being made for compensation for disability under the compensation act; that the employer was duly notified of such application and at the original hearing held before the Deputy Commissioner, the insurance carrier herein denied the jurisdiction of the Deputy Commissioner to hear the case on the ground that the claimant had not pursued and exhausted his third party remedy; that the case had been remanded for further action to the Supreme Court of the District of Columbia, on the ground of error assigned as a result of the original trial; that the [fol. 12] claimant did not pursue his third party remedy in the Supreme Court to its completion and the rights of the employer to subrogation of action were irrevocably prejudiced thereby; that the claimant having abandoned the case and action being dismissed because of failure on the part of the claimant to prosecute, the statute of limitations precludes the employer and insurance carrier from pursuing their subrogated rights.

It is found that the claimant by his action in not pursuing his remedy against the third party to its completion within the statutory limit has thereby prejudiced the rights of and precluded the employer from taking such action as is provided in the compensation law. Based upon the foregoing findings of fact it is ordered by the Deputy Commissioner that the claim for compensation be, and it hereby is rejected for the following reason:

1. That the claimant, having filed his election to pursue his remedy against the third party and having failed to pursue his remedy to completion, has prejudiced the rights of the employer herein by allowing the statutory limit to run against any rights the employer might have had and the claimant therefore is not entitled to compensation within the meaning of the Act.

Given under my hand at Washington, D. C., this twenty-seventh day of June, 1934.

R. J. Hoage, Deputy Commissioner, District of Columbia Compensation District.

Proof of Service

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer, the insurance carrier, the attorneys for the

claimant, and the attorney for the insurance carrier, at the last known address of each as follows:

[fol. 13] Name	Address
Mr. Isaac Chapman,	52 Quincy Street, N. W., Apt. 1, Washington, D. C.
The Palais Royal, Inc.,	11th and G Sts., N. W., Washington, D. C.
Indemnity Insurance Company of N. A. C/o	Ralph W. Lee & Company, 1508 L Street, N. W., Washington, D. C.
Mr. Frank H. Myers,	801 Hibbs Building, Washington, D. C.
Mr. Harlan Wood,	201-5 McLachlen Building, Washington, D. C.
Mr. James P. Donovan,	1001 15th Street, N. W., Washington, D. C.

Mailed June 27, 1934. R. J. Hoage, Deputy Commissioner.

Memorandum

July 11, 1934.—Plaintiff's Affidavit in Forma Pauperis —filed.

[fol. 14] PLAINTIFF'S EXHIBIT "E"

BEFORE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION FOR THE DISTRICT OF COLUMBIA

Before Hon. R. J. Hoage, Deputy Commissioner for the District of Columbia

No. 285-14

ISAAC CHAPMAN, Claimant,

vs.

THE PALAIS ROYAL, INCORPORATED, Employer,

and

THE INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier

Transcript of Testimony at Hearing

Pursuant to notice, this matter was heard before Honorable R. J. Hoage, Deputy Commissioner, United States Em-

ployees' Compensation Commission, at Washington, D. C., on the 26th day of April, 1934, at ten o'clock a. m.

Appearances:

Isaac Chapman, the claimant, in person;
James P. Donovan, Esquire, on behalf of the claimant;
Frank Myers, Esquire, on behalf of the respondent.

[fol. 15] COLLOQUY

The Deputy Commissioner: This is the case of Isaac Chapman, the claimant, versus The Palais Royal, Incorporated, the employer, and the Indemnity Insurance Company of North America, the insurance carrier.

Having been formally set for hearing, the case is presented for consideration at this time.

The parties present are:

Isaac Chapman, the claimant. Is he here?

The Claimant: Yes, sir.

The Deputy Commissioner: Represented by Attorney James P. Donovan.

The witnesses in behalf of the claimant are Doctor Arthur B. McKinney——

Dr. McKinney (interposing): Here.

The Deputy Commissioner: The X-ray plates of Doctors Groover, Christie, and Merritt.

A Witness: Yes, I am Doctor McPeak.

The Deputy Commissioner: Are they all the witnesses you have?

Mr. Donovan: Yes.

The Deputy Commissioner: Representing the respondent is Mr. Frank Myers, assisted by Mr. King.

The witness on behalf of the respondent is Doctor Hall. He will be here at ten-thirty.

Mr. Myers: And Doctor Edward Larkin.

[fol. 16] The Deputy Commissioner: This record shows that the claimant alleges to have been injured on December 15, 1928, and that on the 10th day of June, 1929, notice of election to sue was filed by the claimant in the office of the Deputy Commissioner on the form prescribed by the Deputy Commissioner for that purpose, signifying that the claimant had elected to bring action against the third party, the Washington Railway and Electric Company, and made claim at that time for any deficiency in the amount of com-

pensation recovered under the third-party election; and the claim was carried to the Supreme Court of the District of Columbia and from there to the Court of Appeals. A writ of certiorari having been denied by the Supreme Court of the United States, the case now stands reversed by the Court of Appeals, and the claimant is now appearing before the Deputy Commissioner, making a claim for compensation under the District of Columbia Workmen's Compensation Act.

Claim for compensation was filed on December 17, 1929—that is the formal claim on the form prescribed by the Commission—in which the claimant alleges to have sustained an injury on the 15th day of December, 1928, at four-ten o'clock p. m., as a result of a collision between a truck, on which he was working, and a street car, and he alleges to have suffered a slight concussion of the brain, broken bones of the right foot, bruises and abrasions, and a permanent scar on the forehead, due to a deep laceration, and he further states that he was compelled to stop work on [fol. 17] December 15, 1928. He alleges that his wages were eighteen dollars a week, working six days a week.

Mr. Myers, you are representing the respondent?

Mr. Myers: Yes, sir.

The Deputy Commissioner: Will you admit that the Palais Royal was subject to the provisions of this Act at the time of the alleged injury?

Mr. Myers: Yes.

The Deputy Commissioner: Do you admit that the claimant was in the employ of and rendering service for the employer on that date?

Mr. Myers: Yes, sir.

The Deputy Commissioner: Will you admit that the employer had due notice of an injury?

Mr. Myers: Yes, sir.

The Deputy Commissioner: You do admit that the wages were eighteen dollars a week, working six days a week?

Mr. Myers: I believe that is correct. Of course, he was not employed by us except for a short period of time.

The Deputy Commissioner: That was admitted in the form by the insurance company.

Mr. Myers: Yes.

The Deputy Commissioner: May I ask, Mr. Donovan, what period of disability you are making claim for or are you willing to have that established by the evidence?

[fol. 18] Mr. Donovan: I think I had better do that.

The Deputy Commissioner: You are making claim for temporary total disability and permanent partial disability?

Mr. Myers: Do I understand that no date has been established as to when they are entering this claim for?

Mr. Donovan: Our claim is that the disability started from the date of the accident and, of course, he is still partially disabled at the present time.

The Deputy Commissioner: He is waiting to establish his present total disability by evidence, so you are denying temporary total or permanent disability?

Mr. Myers: We deny any disability.

The Deputy Commissioner: You are denying permanent partial disability as a result of the injury?

Mr. Myers: Yes.

The Deputy Commissioner: Have you any other denials?

Mr. Myers: I raise the question of the jurisdiction of the Deputy Commissioner to hear this case, on the ground that the claimant has not pursued and exhausted his third-party remedy. In other words, although the case was turned down by the Court of Appeals, it was remanded for further action, and such further action was not taken.

The Deputy Commissioner: You have a decree of the Court remanding it for further trial?

Mr. Myers: For further trial in the Supreme Court of [fol. 19] the District of Columbia, based upon a reversal on the ground of error assigned as a result of the original trial.

It is our position that if he does not pursue his third-party remedy to its completion he irrevocably prejudices the rights of the employer to a subrogation of the action, because having abandoned the same and the action being dismissed by failure to prosecute, the statute of limitation precludes us from pursuing our rights.

He has not definitely determined during this period of time whether there is any way he can obtain recovery from the third party.

It was remanded by the action of the Court of Appeals. Now he comes here and elects to pursue the course of the Compensation Law and abandon his third-party claim, and he definitely prejudices that subrogee's action against it.

Unless he can come in here and show definitely by proof from the Court that he has returned to the Supreme Court

of the District of Columbia in accordance with the directions of the mandate of the Court of Appeals and pursued his action there, so as to have it definitely determined there if he has any remedy, and to attempt further action against the third party, he has no right to come in here now.

The Deputy Commissioner: The action was brought against the railway company, was it?

Mr. Myers: That is correct.

[fol. 20] The Deputy Commissioner: As I understood it from the file of the Deputy Commissioner, the case had been completed by the Court of Appeals, but no decree had been handed down remanding it for further hearing, and in lieu of that fact a writ of certiorari was applied for and the Supreme Court of the United States denied the writ.

Mr. Donovan: My recollection of the opinion is—I haven't got a copy—that it was remanded.

The Deputy Commissioner: Do I understand that the claimant failed to make use of his rights under the decree of the Court?

Mr. Donovan: The opinion of the Court was such that it absolutely barred us from that. It held that he was guilty of contributory negligence on the evidence adduced at the trial, which held that there was no negligence on the part of the railroad and which held that he failed to make out a prima facie case and could not recover, since the only witness that we had was Parker, who was the driver of the truck, had since died, and without his testimony at the time this case was submitted, naturally, we had no further redress against the railroad company. We could not proceed further in the Supreme Court of the District of Columbia. However, on the opinion of the Court of Appeals of the District, if they followed the dictum of the Court, the Court must have denied a verdict for the plaintiff in this action.

[fol. 21] Mr. Myers: Of course, on the face of the record it shows that the Court of Appeals, having heard it and having reversed it on certain errors of the first trial, has remanded it to the Supreme Court; and it appears to me that they should have gone down, even with the facts stated by Mr. Donovan; they should have gone down and exercised their rights to conclusively settle their remedy.

I do not want to take advantage of Mr. Donovan this morning, but——

Mr. Donovan (interposing): I must say that in part I am forced to agree with you.

The Deputy Commissioner: Let me ask you this: The judgment is reversed and the case is remanded for further proceedings. Is it possible that that further proceeding might give the claimant the discretion of carrying the case into court or bringing it before the Deputy Commissioner?

Mr. Myers: That had no consideration by them. Other than the facts of the trial below they did not have anything about the Compensation Law. It does not enter into the case; there wasn't an item of it in the case. They remanded it for further proceedings in the court below.

It is my opinion that they should have taken such action to definitely conclude their rights of election, but now they come in here.

The Deputy Commissioner: What course would be pur-
[fol. 22] sued to clear up the situation and leave it free to be brought before this office?

Mr. Myers: They could go down and ask for a new trial. They can either have the judgment entered against the defendant with cause, as instructed by the mandate of the Court of Appeals, or they can ask for a new trial and go upon those facts, evolving upon those facts sufficient presentation for a new jury.

The Deputy Commissioner: In abandoning their rights before the Court, as it stands, they have prejudiced the rights of the employer?

Mr. Myers: They have cut off the right of subrogation. The three-year period has run out. They come in here and they may have a hearing and a certain award may be made and compensation awarded, and our subrogation rights are cut off. We have no standing in court, because our rights are based upon the statute of limitations.

(At this point an informal discussion was had, which, upon the order of the Deputy Commissioner, was not recorded.)

The Deputy Commissioner: I think I shall have to continue the case indefinitely, until that question is settled. Whenever you advise me that the case is perfectly clear of court procedure and make a request for a further hearing, I will be glad to hear it.

(Thereupon the instant hearing was concluded.)

[fol. 23] I hereby certify that the foregoing is a complete and accurate transcript of the shorthand report of the proceedings had and testimony presented at the described hearing, made by Nicholas Cinciotta, a competent shorthand reporter and a member of my staff.

H. S. Middlemiss, Official Reporter.

[fol. 24] PLAINTIFF'S EXHIBIT "F"

BEFORE UNITED STATES EMPLOYERS' COMPENSATION COMMISSION FOR THE DISTRICT OF COLUMBIA

Before Hon. R. J. Hoage, Deputy Commissioner for the District of Columbia

No. 285-14

ISAAC CHAPMAN, Claimant,

vs.

THE PALAIS ROYAL, INC., Employer,

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, Insurance Carrier

Transcript of Testimony at Hearing

Pursuant to notice, this matter was heard before Honorable R. J. Hoage, Deputy Commissioner, United States Employees' Compensation Commission, at Washington, D. C., on June 8, 1934, at 2 o'clock p. m.

Appearances:

Mr. Isaac Chapman, the Claimant, in person;
James P. Donovan, Esq., on behalf of the Claimant;
Frank Myers, Esq., on behalf of the Respondent.

[fol. 25] COLLOQUY

The Deputy Commissioner: This is the case of Isaac Chapman, the Claimant, vs. The Palais Royal, Inc., the employer, and the Indemnity Insurance Company of North America, the insurance carrier.

Having been formally set for hearing, the case is presented for consideration at this time.

A hearing was attempted on the case on April 26, 1934, in which case counsel for the respondent denied the jurisdiction of the Deputy Commissioner in holding the hearing, and the facts were also developed that the case had not been dismissed from the court, where it had been presented for a third party action. The facts pertaining to this are recorded in the transcript of April 26, 1934, which is made a part of the record in this case.

The parties present are:

Isaac Chapman, the Claimant, appearing in person, and represented by Attorney James P. Donovan; and

Frank Myers, representing the respondent.

Do you want to state something, Mr. Donovan?

Mr. Donovan: I just want to say, for the record, that at the prior hearing we said that we were going to attempt to prove partial permanent disability to date. Mr. Myers and I agreed to stipulate that the claimant has been earning $20 a week for the last ten months.

The Deputy Commissioner: All right. For the last ten months ending when?

Mr. Donovan: Ending today.

[fol. 26] The Deputy Commissioner: That is in excess of what he was earning at the time of the injury?

Mr. Myers: That is correct.

The Deputy Commissioner: With that stipulation do I understand that temporary total disability would terminate ten months prior to this date?

Mr. Donovan: Yes, sir; that is correct.

The Deputy Commissioner: That would be August 8th?

Mr. Myers: Yes, August 8th. We will say August 7th, then.

Mr. Donovan: All right.

The Deputy Commissioner: Is there any doubt about the nature of the injury, Mr. Myers?

Mr. Myers: There is no doubt about the fact that this man received injuries and although we stipulated with Mr. Donovan on behalf of the employer and the insurance carrier as to this man's earning capacity, we still deny that he was disabled prior to August 7th, 1933.

The Deputy Commissioner: It is agreed that he suffered a laceration of the forehead and left hand and a fracture of the foot?

Mr. Myers: I think that the nature and character of the injuries should be proved, because they have a distinct bearing on the period of disability.

Mr. Donovan: They have.

The Deputy Commissioner: Can it be admitted that the [fol. 27] wages of the claimant at the time of the injury were $18 a week, working six days a week?

Mr. Myers: How long was he employed?

Mr. Donovan: He had been for about eight months before the accident.

Mr. Myers: That is substantially the whole of the year. Eight months is substantially the whole of the year prior to the accident. I am willing to stipulate that it was $18 a week.

The Deputy Commissioner: What do you mean by that? Do you mean that we can recognize the regular wage as being $18 a week, working six days?

Mr. Myers: That is the average.

The Deputy Commissioner: That is the actual wage.

Mr. Myers: That is the actual wage he was earning at that time.

(At this point an informal discussion was had which, pursuant to the order of the Deputy Commissioner, was not recorded.)

The Deputy Commissioner: You are raising the points that are in the original transcript?

Mr. Myers: Yes.

The Deputy Commissioner: That is a part of the record. Look at it and see if there is anything else you want to raise.

Mr. Myers: I presume I can reaffirm——

The Deputy Commissioner: (Interposing.) I made that part of the record. Is there anything more?

[fol. 28] Mr. Myers: I raise at this hearing the same questions I raised then.

The Deputy Commissioner: Will you admit that the Palais Royal, as an employer, was under the supervision of this Act at the time of the injury?

Mr. Myers: Yes.

The Deputy Commissioner: Do you admit that Isaac Chapman was an employee of and rendering service for the employer-on that date?

Mr. Myers: Yes. I think the same admissions are in the original hearing.

The Deputy Commissioner: Yes. You have admitted the wages, too.

Now, then, your denials are the same as contained in the transcript and you are demanding that proof be furnished with reference to temporary total and permanent partial disability, if any?

Mr. Myers: Yes, and the fact that they have exhausted their remedies in court.

The Deputy Commissioner: Let me understand——

Mr. Myers: (Interposing) I think the same question of jurisdiction is before you at this time and that at the last hearing it had not been shown.

The Deputy Commissioner: Your contention is based on the ground that he failed to exhaust or secure the rights [fol. 29] within the statutory limits and that has barred this insurance company from the rights of subrogation?

Mr. Myers: Also with respect to his pursuing his right against the third party. He should have exhausted his remedies, and not stop and then go back to compensation, because that would bar us from being a subrogee and bar our rights.

The Deputy Commissioner: I think we have a decision in the Van Duesen case. Apparently the claimant had not pursued his rights within one year and barred the employer from bringing his right of action in court, and I rejected the claim, but the Court reversed my opinion; it went so far as to say that the employer had no financial responsibility. That was the action of the Court and it reversed my action.

Mr. Myers: I do not think the Van Duesen case is the same as this. Here a very definite action had been taken by the employee to prosecute his claim and he has done so, but he has not followed that as to definitely preclude him from getting relief from that source, and he must definitely conclude it from that end, because then the remedy we have is a hollow one, which cannot be followed.

The Deputy Commissioner: May I ask, Mr. Donovan, just what has been done? Was the case finally dismissed from the Court?

Mr. Donovan: That is correct, and it was done in abidance with the decision of Mr. Justice Bailey, who stated that in his opinion the matter could be sent back and [fol. 30] that you would have complete jurisdiction of it. We attempted to get it before the jury. As a matter of law, in the light of the opinion of the Court of Appeals rendered in the Chapman case, we are absolutely barred from proceeding further, because in that case he was held guilty of contributory negligence, and as the doctrine of the last clear chance was held not to apply, naturally, we had no right to proceed any further. Mr. Justice Bailey was of the opinion that the dismissal of the action would permit it to go before you.

The Deputy Commissioner: I am going to take the matter.

Mr. Myers: I merely want to preserve my rights, because the records of the Court—I think I am right in this—show that the case was not dismissed by the Court but was discontinued by a præcipe filed by the attorneys, and that under the circumstances it was a voluntary action on the part of the claimant through his attorneys that the action was discontinued.

The Deputy Commissioner: I am going to take jurisdiction, Mr. Myers, for the purpose of going ahead with the case.

Mr. Myers: I want the record to contain that information.

The Deputy Commissioner: Who is representing the claimant?

Mr. Donovan: Mr. Wood and Mr. Donovan.

The Deputy Commissioner: What witnesses do you have?

Mr. Donovan: Dr. Jack and Dr. McKinney are in the waiting room.

The Deputy Commissioner: Are they all the witnesses [fol. 31] you have?

Mr. Donovan: Yes.

The Deputy Commissioner: Representing the respondent is Mr. Frank Myers. Do we have somebody with the Zenbury Brothers' records?

Mr. Myers: They were subpœnaed. I do not know whether they are here or not.

The Deputy Commissioner: What witnesses do you have Mr. Myers?

Mr. Myers: I have Dr. Larkin and Dr. Hall.

The Deputy Commissioner: Is that all?

Mr. Myers: Yes.

The Deputy Commissioner: I will ask Mr. Chapman and Dr. Hall to please stand and be sworn.

(Thereupon the claimant and Dr. Hall duly sworn by the Deputy Commissioner.)

Mr. Myers: Do you want to put the doctors on first?

Mr. Donovan: Yes; I would like to put them on first.

The Deputy Commissioner: Dr. Jack and Dr. McKinney, will you please stand and be sworn?

(Thereupon the witnesses indicated were duly sworn by the Deputy Commissioner.)

Thereupon——

Dr. Arthur B. McKinney was called as a witness for and on behalf of the claimant and, having been previously duly [fol. 32] sworn by the Deputy Commissioner, as above indicated, assumed the witness stand and upon examination testified as follows:

Examination in Chief.

By the Deputy Commissioner:

Q. Doctor, give your full name.

A. Arthur B. McKinney.

Q. What is your address?

A. 1515 First Street, Northwest.

Q. Of what school are you a graduate and in what year did you graduate?

A. 1914, Howard University.

Q. Did you practice any special line of medicine?

A. General surgery.

Q. You are a general practitioner?

A. General practitioner, yes.

The Deputy Commissioner: All right, Mr. Donovan.

Direct examination.

By Mr. Donovan:

Q. You do not practice surgery now?

A. Not now.

Q. When was the last date that you performed any surgical operation?

A. It depends upon——

Q. (Interposing.) A major operation.

[fol. 33] A. Well, I should judge since—before I got sick in 1926.

Q. That was the date of your illness?

A. Yes, May 5, 1926.

Q. Since that time you have been devoting yourself to the general practice of medicine?

A. Yes, general practice. Of course, it is called a medical part of surgery just the same.

Q. Do you know Isaac Chapman, who is sitting there (indicating)?

A. I do.

Q. Sometime after January, 1929, did you have occasion to treat Mr. Chapman?

A. About 1929, but I don't exactly remember the date, but it was in 1929.

Q. Do you have your records?

A. No; I did not bring them with me.

Q. You did not bring your records?

A. No.

Q. You do not remember the date when you first treated him?

A. He got hurt in December and I think I saw him in January.

Q. January, 1929?

A. 1929, yes.

[fol. 34] Q. What did he complain of then?

A. He complained of great stiffness, inability of locomotion; he could not function; he could not jump and move about as he used to.

Q. Did you examine Mr. Chapman at that time?

A. Yes, sir.

Q. As a result of your examination, Doctor, what did you find to be the trouble with him?

A. Well, I found, from his history and what I found, that he had a lack of motion in the great left tow—I think it was

the left or right—the great toe. He had a fracture of the metatarsal bone; he had a stiff ankle; and he had some adhesions and some tenderness of the foot, so he could not manipulate that foot as he ordinarily could; it was stiff.

Q. For how long a period did you treat him, Doctor?

A. I had strapped his ankle once. It was weak; it was giving away first when he came. Then about two weeks after that—Then he came again some time later; I don't know just when. I think I treated him off and on for at least—off and on until now, steadily, because he would drop in most any time. When he felt bad he would drop in.

Q. Did he complain of any other ailments besides complaining of his foot?

A. Why, yes, he said the head hurt him, and he was not able to sleep at first.

[fol. 35] Q. Did you find any evidence of any injury to his head?

A. Well, an old scar, which had healed up.

Q. Where was the scar?

A. On the scalp. I think it was on the right side; it was on the scalp.

Q. During this period that you treated Mr. Chapman what did he complain of other than the broken foot?

A. Nervousness and insomnia; that is, he was not able to sleep at night, but the greatest complaint was the inability to move on that foot.

The Deputy Commissioner: Do I understand that the Doctor's statement was that his disability was due to the injury to his foot and a head injury, which caused the insomnia?

The Witness: I think the insomnia was the result of the accident and his anxiety. I do not think the injury caused that.

By Mr. Donovan:

Q. Have you any idea when the last date of the treatment was?

A. The last day I treated him?

Q. For the injuries you just mentioned.

A. I think a day or two before we had to go to court for trial. I think it was 1932; in the spring time of 1932.

Q. February, 1932?

A. That is about when it was.

[fol. 36] By the Deputy Commissioner:

Q. You treated him to February, 1932?

A. I treated him a few days before we went to court.

The Deputy Commissioner: What date was that?

Mr. Donovan: February 3, 1932 was the day of the trial.

The Deputy Commissioner: I will put it as February 1st.

By the Deputy Commissioner:

Q. That would be approximately it?

A. Yes.

By Mr. Donovan:

Q. As the result of your treatments of Mr. Chapman during that period did you diagnose the exact condition he was suffering from with his foot?

A. Treatment?

Q. Did you diagnose what he was suffering from with reference to his foot? During that period was he suffering from a fracture of the foot and was it as the result of that injury, or did some disability develop?

A. As a result of that injury he suffered from an old healed fracture. When a fracture heals up callous forms particularly if a nerve is caught, it would give pain. It would have a periosteal thickening and there would be pressure. If you press down on it like that (indicating) it would pain.

Q. Did you give him any treatment for that periosteal thickening?

[fol. 37] A. Yes, for the periosteal thickening.

Q. For how long did you treat him for that condition?

A. I should judge, off and on, for two or three months or more; at least that long.

Q. During that time was he able to walk without the aid——

A. (Interposing.) With a walking cane. He was walking with a walking cane.

Q. It was necessary for him to use a cane?

A. Yes.

Q. During that period was he able to do any work which would require that he use his foot a great deal?

A. To the best of my knowledge, I have known him for quite some time. After he had that accident I have not seen him work at all; I have not seen him work.

Mr. Myers: I object to that answer. The question was, Was he able to perform the work?

The Witness: I should say no, not the character of work he was doing.

By the Deputy Commissioner:

Q. He was not able to resume his work on February 1st, 1932?

By Mr. Myers:

Q. Is that your answer?

A. The last time I saw him was February 1, 1932, just before court. I would say that he would not be able to work doing the character of work he had formerly done. Yes, I would say that.

[fol. 38] By the Deputy Commissioner:

Q. What was the reason for his inability to work? The condition of the foot?

A. The condition of his foot.

Q. How about his mental anxiety?

A. I do not think that would necessarily follow.

Q. His total disability at that time was due to his foot injury?

A. That is my opinion.

By Mr. Donovan:

Q. Doctor, did you notice a deformity of the foot as a result of that accident?

A. I did, because in any accident, if it heals up, you are going to have some deformity.

Q. Would you say that that was a permanent deformity or has it been rectified, if you know?

A. Once any bone is broken and the callous forms, it is that way for life; it never——

Mr. Myers: I object to this line of answering. The question was whether this man had any, and not any bone in any one. I think he ought to be restricted to that.

By the Deputy Commissioner:

Q. Did you take an X-ray picture at any time?

A. No, sir; I did not.

Q. Did you at any time see an X-ray?

A. Yes; I saw it in court only.

[fol. 39] Q. Do you remember when that picture was taken?

A. I think Drs. Groover, Christie and Merritt had it.

Q. There was an X-ray picture taken on the 16th day of December, 1928, at Emergency Hospital. Is that the picture you are talking about?

A. I suppose it was.

Q. When you said that you gave your last treatment did you see any picture then?

A. No, sir.

Q. How did you determine that there was a periosteal thickening?

A. By pressing with my fingers.

Q. Because of tenderness?

A. On pressure, feeling (indicating). That is the only way I could determine—with my fingers.

Q. That was the metatarsal of the great toe?

A. Yes.

Q. Was there any deformity of angulation?

A. Elevation; not on a straight level.

Q. Was it on more than a normal elevation than the dorsal part of the foot?

A. Yes.

Q. You saw no pictures to see if there was an angulation of that?

A. No.

[fol. 40] Q. You determined it was a periosteal thickening by feeling it with your fingers?

A. Yes, by palpa*ta*tion.

The Deputy Commissioner: As I understand it, he has not seen him since that time, to determine the amount of the disability?

Mr. Donovan: No.

By Mr. Donovan:

Q. You have seen him since that time?

A. Yes.

Q. But you have not made any physical examination of him since that time?

A. No, I have not.

Q. During that period did you have occasion to treat Mr. Chapman for any nervous disorder?

A. Yes; inability to sleep at night, insomnia.

Q. Did you prescribe anything for it?

A. Yes, I did.

By the Deputy Commissioner:

Q. Was that subsequent to February?

A. Prior to February. He used to have a little tremor, you know, shaking like that (illustrating).

By Mr. Donovan:

Q. He did?

A. Yes.

[fol. 41] Q. Did that condition also contribute to his inability to work, in your opinion?

A. I think that was more due to the foot than to the nervousness.

Q. Was there a contributing cause?

A. Which?

Q. The nervousness?

A. Yes, I think it was.

Q. Of course, that contributed to his inability to perform——

A. (Interposing): His usual amount of labor; yes, that is true.

Mr. Donovan: I think that is all.

Cross-examination.

By Mr. Myers:

Q. What sort of treatment did you give this man?

A. I gave him electrical massage.

Q. What type of electrical massage?

A. Diathermy.

Q. What is your diathermic treatment?

A. Diathermic treatment, but I was using a violet ray on him at that time. That stimulates the circulation.

Q. Was that the first type of treatment the first time you saw him?

A. No. I strapped his ankle the first time.

[fol. 42] Q. You strapped his ankle the first time.

A. Yes. His ankle was weak.
Q. Were you the first one to treat him?
A. You mean after he left there?
Q. What was the first treatment you gave him?
A. I strapped his ankle and gave him medicine.
Q. What kind of medicine?
A. An opiate; just what, I don't know. I think it was—An opiate.
Q. You strapped his ankle?
A. Yes.
Q. How long did that strapping remain on it?
A. About two weeks.
Q. You took the strapping off then?
A. Yes.
Q. What else did you do during the first treatment?
A. I gave him medicine.
Q. What else did you do?
A. That is all.
Q. All you did was to give him an opiate and strap his ankle on the first time you saw him, which was about the first part of January, 1929?
A. Yes; I think it was about the first part of January.
Q. On that occasion you merely gave him an opiate and strapped his ankle?
[fol. 43] A. Yes, if I remember correctly.
Q. When did you next see him?
A. About two weeks after that.
Q. You did not see him again for two weeks?
A. I did not see him again for two weeks.
Q. What did you do on the next occasion?
A. Strapped his ankle once more.

By Mr. Donovan:

Q. What was the matter with the ankle?
A. He was complaining of inability to steady himself. He did not feel good. He wanted it strapped up, so I strapped it.

By Mr. Myers:

Q. Was anything wrong with the ankle?
A. It gave him pain.
Q. Was there any fracture?
A. Not to his ankle, not to my knowledge, no.

Q. What did you do on the second occasion? Did you strap it up?

A. About two weeks after that, yes.

Q. When did you see him again after that?

A. I don't know. I guess about ten days or a week or more.

Q. What did you do on the third time?

A. Took it off and gave him electrical treatment.

Q. It was not until the third time that you gave him diathermic treatment?

[fol. 44] A. Yes.

Q. You say that you saw him some time in February, 1929?

A. I suppose it was, yes.

Q. At that time you gave this diathermic treatment? How often did you give him that?

A. I think he got it three times a week for about two months.

Q. For about two months?

A. Two or three months.

Q. February and March and up until April, 1929?

A. I could not say for sure, but I would say—not having my records—up until two or three months; something like that; about three times a week.

Q. You gave him diathermic treatments three times a week?

A. Yes.

Q. To what portion of his body were they given?

A. To his ankle, his foot, the upper surface and the lower part of his foot, and the toe.

Q. What was wrong with his foot?

A. His foot was stiff.

Q. Was he walking on it at that time?

A. Walking with a cane; yes.

Q. At that time he was walking with a cane?

A. Yes.

The Deputy Commissioner: What is the time?

[fol. 45] Mr. Myers: We are talking now about February, 1929.

The Witness: Yes.

By Mr. Myers:

Q. He was walking with a cane at that time, and was receiving the heat treatments three times a week; is that correct?

A. Yes.

Q. In February, 1929, he was walking with a cane and receiving heat treatments three times a week until about April, 1929?

A. A couple of months.

Q. That was in April. What happened in April, 1929?

A. Let me see. I don't know what happened, but I do not think I treated him any more.

Q. You did not treat him any more?

A. Not right then.

Q. When was the next time you treated him in April?

A. I won't say specifically any month. I judge about two months; from April, or when it was; I couldn't say.

Q. Judging from your own recollection, when was it after April, 1929, that you again treated him?

A. You mean for what? There wasn't—maybe I probably treated him most any time. For instance, he would catch a cold; he would come to see me.

By the Deputy Commissioner:

Q. When did you treat him again for that injury?

[fol. 46] A. For that same injury?

Q. Yes.

A. I don't recall. Let me see. It seems to me I treated him some time during the summer, but just when it is hard for me to say without looking at the books.

By Mr. Myers:

Q. What did you do for him in the summer of 1929?

A. Gave him some massage for the foot and ankle.

Q. He was using the foot all the time?

A. Yes.

Q. Did you determine in April, 1929 that anything necessary in the way of palliatives or remedial treatment was completed at that time?

A. Did I do what?

Q. When did you determine that all the treatment you thought he required, from your standpoint, was completed and that he must use his foot?

A. I think it was about a couple of months after I took the strap off.

Q. In April, 1929?

A. About that time.

Q. At that point you had determined that there was no further necessity for diathermic treatment?

A. Not unless he had more discomfort.

Q. You told him to go ahead and use his foot at that time?

A. Yes.

[fol. 47] Q. How much disability did he have at that time?

A. Well——

Q. (Interposing) From a medical standpoint.

A. At that time I would say, so far as function was concerned, it was almost total. It was not partial; it was almost total. You could not flex his ankle; it was so stiff.

By the Deputy Commissioner:

Q. Do I understand that this is after you gave him massage?

A. At the time.

Q. At the time you were giving him massage?

A. Yes.

Q. Mr. Myers and I want to know when you quit giving him massage in April, what was the condition of his foot?

A. He could move about, but he did not seem to be able to flex his foot and be able to use it as he had before this accident.

Q. You have not seen him since April?

A. I have seen him most any time. He lives near me and I see him almost any time.

Mr. Donovan: He testified that he saw him in February, 1932, and his treatments stopped in 1932, which was three years after the injury.

Mr. Myers: We are developing that he treated him for a larger number of things.

[fol. 48] By Mr. Myers:

Q. After you finished giving diathermic treatments in April, 1929 what was his disability at that time in regard to his foot? What was the extent of his disability?

A. I would say almost total.

Q. Do you mean 90 per cent?

A. Yes, about 90 per cent.

Q. When you had finished giving him electrical treatments and concluded he did not need any more and that he should go ahead and use his foot, at that time he had 90 per cent. disability from a functionally disabling point?

A. Yes.

Q. Did you see him again in the summer of 1929?

A. Yes.

Q. At that time what was the extent of disability?

A. Almost the same as when I left.

Q. No improvement?

A. Not much.

Q. Would you say it was about 80 per cent.?

A. I would not want to estimate that—Well, I should say, if you judge it that way, yes.

Q. Was that for the foot or the toe?

A. Toe and foot. You need the toe to walk with.

Q. He was walking at the time?

A. Yes.

[fol. 49] Even though he was walking, you would still estimate that his disability in the summer of 1929 was 80 per cent.?

A. Well, wait until I figure the dates.

Q. In April, 1929 you finished the heat treatments?

A. Yes.

Q. You determined at that time that he did not need any more heat treatments and he should go ahead and use his foot and he had the functional disability of 90 per cent.?

A. Yes.

Q. You treated him after that?

A. I saw him in the street.

Q. You did not look at his foot?

A. I saw him in the street; I looked at his foot.

Q. You looked at his foot in the street in the summer of 1929?

A. Yes.

Q. And at that time what did you determine? What test did you make?

A. I did not make anything but observation. I put my hand on it like that (indicating).

Q. You put your hand on him?

A. Yes; I put my hand and did that (indicating).

Q. When, after the summer of 1929, did you see him again professionally with reference to his foot?

A. I will have to get the records; I can't remember.

[fol. 50] Q. What is your best recollection as to when you next saw him after the summer of 1929 with reference to the examination and determination of the disability of his foot?

A. I think that I saw him one day last summer.

Q. 1933?

A. Yes.

Q. I thought you said the last time you treated him professionally was February 1, 1932.

A. Yes. You asked me when I saw him the last time.

Q. I asked you and you said in the summer of 1929 in the street and you saw and observed his foot and determined at that time that his foot was totally disabled, functionally, 80 per cent.

A. Yes.

Q. When, after the summer of 1929, did you see him again and see his foot?

A. No more after that. I have not seen him since then.

By Mr. Donovan:

Q. Did you not just previously testify that you examined him on February 1, 1932, to see if he had functional disability?

A. Let me write this down. The way he is talking about, you are making an effort to confuse me.

Mr. Myers: I am not trying to confuse you.

The Deputy Commissioner: We will have this off the record.

[fol. 51] (Thereupon an informal discussion was had which, pursuant to the order of the Deputy Commissioner, was not reported.)

By Mr. Myers:

Q. In the summer of 1929 you say that you saw him on the street?

A. Yes.

Q. You observed his foot and felt it and determined at that time that he had a functional disability to his foot of 80 per cent.?

A. Yes.

Q. When next did you see the man and examine his foot to determine the disability?

A. When did we go to court?

Q. You went to court February 3, 1932.

A. I saw him in February just before we went to court.

Q. At that time you looked at his foot and examined him?

A. Yes.

Q. How much did you determine his foot was disabled at that time?

A. At that time I would say he had about 90 per cent. disability.

Q. He had 80 per cent. in the summer and that went back to 90 per cent.?

A. In other words, he had 90 per cent. You led me to say 80 per cent. I would not say 80 per cent. of my own accord.

[fol. 52] Q. Go back, then, and correct your statement. In the summer of 1929 he had how much functional disability of his foot?

A. 90 per cent.

Q. He still had 90 per cent. functional disability on February 1, 1932?

A. February, 1932, yes. That was before I went to court?

Q. Yes.

A. That is right.

Q. He still had 90 per cent. functional disability at that time?

A. Yes, I would say that.

Q. But you had determined back in April, 1929 that he did not need any further treatment, as far as your examination went?

A. In 1929 I would say he did not need any treatment.

Q. Why was the foot in the summer of 1932 showing a functional disability of 90 per cent.?

A. I would say the adhesions and this calloused bone formation where it was united.

Q. Didn't your heat treatments help to break this up?

A. It would help, but it does not help to do what we wanted it to do. We try to do everything in medicine, but it does not help——

[fol. 53] Q. (Interposing) When did you give this massage?

A. You see, heat stimulates the circulation to the part and causes the lymphatics to go there, and causes improvement in the blood circulation.

Q. Did you give massage at the same time?

A. Yes, massage at the same time.

Q. You did not use manual massage?

A. No.

Q. In the course of your treatments you did not use manual massage?

A. I had a machine to do it with; just a massage machine that you go over with like that (illustrating).

Q. As a matter of fact, did not that break up the adhesions?

A. I could not say it did. You can't break all adhesions; sometimes you have got to operate.

Q. Did you ever take an X-ray of this case at all?

A. No, sir, I did not. I do not do X-ray work.

Q. Did you have him send for an X-ray?

A. No, sir, I did not.

Q. You did not think it was necessary?

A. I thought it was necessary. He did not have the money to pay for it. It is always necessary to have X-ray pictures made.

Q. Am I correct in saying that you did not see the man [fol. 54] between the summer of 1929 and February 1, 1932, with reference to his foot; is that correct? Was that between the summer of 1929 and February 1, 1932?

A. Yes.

Q. With reference to his foot?

A. Yes.

Q. What sort of examination did you give this man on February 1, 1932?

A. February 1st I put his foot upon a table. I made an examination by using my hands, manipulation.

Q. What is that?

A. I used my hands. I put him on a table. I manipulated, doing like this (illustrating).

Q. Did you attempt to let him use it to see how he was using it?

A. I could see him using it when he came in.

Q. Did you let him bend while standing?

A. I did not do it.

Q. Did you determine the functional disability by manual motion?

A. I did it by myself, by passive motion; that is, by doing it myself.

Mr. Myers: That is all.

[fol. 55] Redirect examination.

By Mr. Donovan:

Q. At the time when Chapman came to see you in January, 1929, did he have a cast on his foot?

A. No, he did not.

Q. You stated, Doctor, that in April, 1929, you met Chapman on the street and you felt his foot at that time?

A. I said the summer; I did not say April.

Q. Could you state, Doctor, to the best of your recollection, whether he had normal use of his foot at that time?

The Deputy Commissioner: The Doctor said he had 90 per cent. disability.

The Witness: Yes, I did.

By Mr. Donovan:

Q. You also stated on cross-examination that you did not see Chapman between the summer of 1929 and February 1, 1932; is that correct?

A. I just saw him as a friend, not to examine his foot.

Q. I would like to direct your attention to the testimony you gave in the Chapman case in the Supreme Court about the time of treatment.

The Deputy Commissioner: Is he your witness? Are you trying to impeach him?

Mr. Donovan: He has taken me by surprise.

Mr. Myers: He has had plenty of chance to talk to this man. I do not think you have any right to bring in that [fol. 56] testimony. You cannot impeach your own witness with his testimony.

Mr. Donovan: I certainly think I do. Mr. Myers understands the position I am in. I have not talked to the witness.

The Deputy Commissioner: I am not going to allow you to impeach your own witness, because that means you have no medical testimony.

Mr. Donovan: I have Dr. Jack.

By Mr. Donovan:

Q. Is that you best recollection?

A. About treatment?

Q. Yes. Do your records show the extent of the time you treated him?

A. I think I did.

Q. Will you get those records and bring them here?

A. I will see if I can find them. You see, during the course of my sickness I was not able to look after my things. Therefore, a lot of them were lost. I think I testified to that in court.

Q. Will you attempt to find those records? Couldn't you get them now and bring them back?

A. I will try to get them.

Mr. Donovan: I ask that he be excused.

By Mr. Myers:

Q. My recollection is that you had difficulty in finding your records and reports at the time of this trial.

[fol. 57] A. Yes.

Q. There was a great deal of questioning about the authenticity of it in that trial.

A. They wanted to know if it was true.

The Deputy Commissioner: What do you want to prove by the records? Are you trying to show that there was disability beyond February 1, 1932?

Mr. Donovan: Of course, the Doctor can't testify to it. The one point I want to clear up is that the Doctor has testified on cross examination that he did not see Chapman between the summer of 1929——

The Deputy Commissioner (Interposing): His testimony was that he had 90 per cent. disability on February 1, 1932, which was the same as in the summer of 1929.

Mr. Donovan: All right, sir.

By Mr. Myers:

Q. Doctor, you are quite positive that when this man came to you he had no cast on his foot?
A. Yes.

Mr. Myers: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon——

DR. WILLIAM A. JACK was called as a witness for and on [fol. 58] behalf of the claimant and, having been previously duly sworn by the Deputy Commissioner, as above indicated, assumed the witness stand and upon examination testified as follows:

Examination in Chief.

By the Deputy Commissioner:

Q. State your full name, Doctor?
A. William A. Jack.
Q. What is your address?
A. 2250 Cathedral Avenue.

The Deputy Commissioner: Do you admit Dr. Jack's qualifications as a surgeon and physician?
Mr. Myers: Yes.

Direct Examination.

By Mr. Donovan:

Q. Dr. Jack, did you have occasion to examine Isaac A. Chapman?
A. Yes. I was asked to examine him one day.
Q. Do you have the date of that examination?
A. I think it was in 1932.

By the Deputy Commissioner:

Q. You may refer to your records, if you wish.
A. I examined him, yes.

By Mr. Donovan:

Q. Was there any other doctor present at that time?
A. That I can't remember; it was a long time.

[fol. 59] Q. Do you recall whether Dr. Larkin was there?

A. I don't recall. I had to dig this up to find out when it was.

The Deputy Commissioner: Do I understand that he examined him at the time Dr. McKinney examined him in February, 1932?

Mr. Donovan: No; I do not think so. I do not know the date at all.

By Mr. Donovan:

Q. Do you have an idea as to the approximate date, Doctor?

A. I think it was some time in May.

Q. May, 1932?

A. Yes; that is as near as I can get at it. I saw the man but one time, at that time.

Q. As a result of that examination what did you find to be the trouble?

A. He had a healed fracture of the first metatarsal bone of the right foot and some limitation of motion, where the extensor tendon goes over, and some thickening around the site of the fracture.

Q. Did you examine the X-rays, Doctor?

A. No; I never saw the X-rays.

Q. What was the extent of his disability as a result of the injury at that time?

A. Why, he limped slightly and complained of pain on [fol. 60] weight-bearing.

Q. Would you say, as a result of your examination, that he could have used his foot in an occupation that required that he get around and jump around up steps perhaps twenty-five or thirty-five times a day?

A. He could, but it would be painful. A man can do a lot of things if he has to, but not comfortably, with an old healed fracture.

Q. Did you notice any permanent deformity of the foot at that time?

A. I could not make out any deformity except the thickening from the healed fracture.

Mr. Donovan: That is all.

Cross-examination.

By Mr. Myers:

Q. Can you give us any better recollection as to when you made this examination?

A. No; that is as near as I can come to it.

Q. Do you recall whether or not it was after the trial which this young man had, or was it before?

A. That I do not know. I did not know there had been a trial.

Q. Did you know whether or not Dr. Larkin had made an examination at the same time or approximately the same time as you had?

[fol. 61] A. That I do not recall at all.

Q. If Dr. Larkin made an examination in May, 1929, would that help your recallection in determining as to when you made your examination?

A. No. I just dug up an old record that I saw this man Chapman at such and such a time, in May.

Q. Does your record show the year?

A. 1932.

Q. It shows the year to be 1932?

A. Yes.

Q. What was the occasion for the examination?

A. I don't know. Dr. McKinney asked me to look at his foot.

Q. You heard him testify that the last time he saw him professionally was April 1, 1932?

A. I don't know anything about that.

Q. Doesn't that bring to light that you are probably in error as to the date?

A. I may be in error.

By the Deputy Commissioner:

Q. Might it have been in 1931?

A. It might possibly have been. As I say, I have a recollection of seeing the man just that one time.

By Mr. Myers:

Q. What did you find? An old healed fracture of what?

[fol. 62] A. Of the first metatarsal of the right foot.

Q. I believe you said that you did not have occasion to treat the injuries in this case.

A. No, I did not.

Q. Where is the metatarsal bone in the foot?

A. Well, now, here (indicating) is your toe. The metatarsal is the one that comes before your phalanx (indicating).

Q. The metatarsal is here (indicating)?

A. Yes, here (indicating).

Q. What is this (indicating)?

A. This (indicating) is the phalanx.

Mr. Myers: Will that be stipulated, in order not to have Dr. McPeak come here, as to what the X-ray findings were?

Mr. Donovan: Yes.

By Mr. Myers:

Q. Doctor, look at that (handing a paper to the witness). Will you tell me what injury you found following the injuries disclosed by this X-ray report?

A. I didn't find anything at all except this thickening of the metatarsal.

Mr. Myers: I offer for the record this X-ray report, which has been agreed upon. It is the X-ray which was taken in this case on December 17, 1928, by Dr. McPeak. It gives the following findings:

"Examination of the right foot shows a fracture through [fol. 63] the middle third of the first phalanx of the great toe with no appreciable displacement. The position is satisfactory.

"There is also a small fragment detached from the proximal lateral articulating surface of this toe with no displacement.

"There is a complete fracture through the middle third of the second phalanx of the second toe, with no appreciable displacement. The position is satisfactory.

"There is also a complete fracture of the second phalanx of the fourth toe, with angulation, concavity to the bottom of the foot.

"There is a fracture through the tip of the terminal phalanx of the little toe, with no displacement. The position of all of the fragments is satisfactory with the exception of the one involving the middle phalanx of the fourth toe."

The Deputy Commissioner: Was that the first toe?

Mr. Myers: It is the first toe and the middle third of the phalanx of the second toe and the second phalanx of the fourth toe.

The Deputy Commissioner: That is the first, second and fourth toes?

Mr. Myers: First, second and fourth toes.

By Mr. Myers:

Q. Which one of these injuries did you find?

A. I didn't find any of those injuries. All I found was an old injury here (indicating).

[fol. 64] The Deputy Commissioner: Indicating the first metatarsal bone.

By Mr. Myers:

Q. You found no injury affecting any of the phalanxes?

A. No. I did not find any. At the — I saw him it had been some time after any injury. They might have occurred——

Q. (Interposing): Since that time?

A. Before that time, because I had no real way of knowing——

Q. (Interposing): You are not in a position to say that what you found was anything resulting from this particular accident in 1928?

A. No.

Q. As a matter of fact, the X-ray does not show that particular fracture?

A. No, That had been healed up long enough, so it would not show.

Mr. Myers: No further questions.

Redirect examination.

By Mr. Donovan:

Q. Would you say that the injury that you did find was the sole cause of the disability which the man suffered from his foot?

A. As I say, the disability, except for the history of the injury to his tendons, I would not say that the bony injury

had anything to do with the—the bony disability I found [fol. 65] had anything to do with the limp.

Q. It was another injury?

A. An injury to his tendons could cause that.

Recross-examination.

By Mr. Myers:

Q. Did you find any injury to his tendons?

A. You can't find that; only from stiffness.

By the Deputy Commissioner:

Q. From functional use?

A. Yes.

By Mr. Myers:

Q. Leaving out as to what was the particular fracture in this case, what did you find at the time of the examination to be the functional disability of this man?

A. He walked with a decided limp and complained of great pain on weight-bearing.

Q. What was his disability at the time you saw him?

A. As I say, he had a slight limp.

Q. Could you estimate any percentage of what the disability of his foot was at that time?

A. Hardly, because I do not know how much disability he had before I saw him.

Q. How much would you say it was at that time, taking into consideration all the factors?

A. Well, of course, my opinion would be biased, looking [fol. 66] at all the other injuries.

Q. From your own examination?

A. From my own examination, I would say the injury was due more to the involvement of his nervous structure rather than his bone structure. This old thing might be pressing on some of the smaller nerves and hurting him.

Q. Would you be able to say what percentage of functional disability he had of his foot at that time?

A. No, I would not.

Mr. Myers: I have no further questions.

Mr. Donovan: That is all.

By the Deputy Commissioner:

Q. The functional disability of the foot was due, in your opinion, to the fracture of the metatarsal bone?

A. Yes.

Q. And not to the fracture of the toes?

A. Because that is all I found.

Q. Was there any disability of the foot due to the fracture of the first, second and fourth toes, as far as you could observe?

A. Not as far as I could observe, because my observation was that the limp was due to the injury of the first toe. You do not limp on it from injuries of the first, second and fourth toes.

By Mr. Donovan:

Q. Could you notice whether there was any fracture of [fol. 67] the big toe, the phalanx?

A. I don't recall.

Q. There could have been?

A. It could have been and I might not have seen it at all.

Q. That could have contributed to the functional disability?

Mr. Myers: He said he did not find any. How could he say whether it could if he did not find any?

The Witness: I could not find any.

The Deputy Commissioner: The Doctor said there was no disability from the injury to the toes, but it was due to the metatarsal.

Mr. Donovan: I think he testified contrary to that.

By the Deputy Commissioner:

Q. Did you testify that the disability the man was suffering from was due to the fracture of the metatarsal and none of it due to his toes?

A. I said yes, I said it was due to the tendon involvement and not to the bone involved. The bone, as I say, was all healed, and that would not cause any disability, because there was no deformity.

Q. You said no disability as the result of the fracture of the toes?

A. I said that I did not think there could be any disability as far as making a man limp, if there was a fracture of the [fol. 68] first toe.

By Mr. Donovan:

Q. It was all in the tendons?
A. Yes, sir.

By Mr. Myers:

Q. From the first metatarsal?
A. From my observations, yes.

Mr. Myers: That is all.
Mr. Donovan: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon——

Dr. Custis Lee Hall was called as a witness for and on behalf of the respondent and, having been previously duly sworn by the Deputy Commissioner, as above indicated, assumed the witness stand and upon examination testified as follows:

By the Deputy Commissioner:

Q. Doctor, give your full name and address.
A. Custis Lee Hall, 1801 R Street.

The Deputy Commissioner: The qualifications of the Doctor will be admitted unless there is some objection.
Mr. Donovan: No objection.
Mr. Myers: May I, for the benefit of the record, know whether this man's correct name is Isaac or Isaiah?
[fol. 69] Mr. Donovan: It is Isaac.

Direct examination.

By Mr. Myers:

Q. Will you be good enough to state, for the benefit of the record, when you first saw this man and what your findings were?
A. April 13, 1934.

Examination: As this man stands, there is a typical racial flat foot, not any more marked on the right than the left. The weight seems to be evenly on the two feet. He has a slight tendency to avoid rising on the toes on the right foot, complaining of discomfort, but he is able to squat on the same foot without difficulty. There is no residual limitation of function in the movements of the ankle, and the measurements of the right calf indicate one-fourth inch greater circumference than the left, although there is no evidence of swelling or induration at this time. There is some slight tenderness complained of in the plantar fascia region on the right foot, but there is no evidence of thickening or induration. All the metatarsal heads are in good position. All of the toes appear normal at this time. There is, however, a slight tendency for flexion of the toes, second and third, but the toes are flexible in all directions. There is no angulation laterally of any of the toes and no tendency for hammer toe. The great toe joint seems normal in motion. The left foot shows substantially the same [fol. 70] appearance as the right and the arch is in the essential position as compared to the right.

Examination of this patient's shoes indicates that there is no abnormality in walking; if anything, the right shoe is a little more worn across the ball of the right foot than the left. In other words, there is no indication of an abnormal protection of the right foot.

X-ray films at Emergency Hospital are not available, having been destroyed because of the fact that they were made of inflammable material.

The X-ray report has been read into the record.

My diagnosis was: 1, Multiple fractures of the toes, second, third and fourth, healed; 2, functional strain, residual, metatarsal region, very slight.

By the Deputy Commissioner:

Q. What is that?

A. Very slight.

Q. What was that?

A. Metatarsal region, functional strain—residual functional strain.

"Opinion: This patient states that he has attempted to work driving a truck and that the discomfort associated with the use of his foot caused him to give up such work.

He states that he has done practically nothing since the injury. The laceration of the forehead which the patient [fol. 71] mentioned is apparently not causing any symptoms at the present time. While there is a slight scar in this region, I do not believe that it is causing symptoms at the present time.

"Whatever disability this man has is entirely functional and I believe associated more with a protective mechanism and lack of use, as he should have been able to return to his occupation several years ago. I doubt if any medical treatment is necessary."

By Mr. Myers:

Q. You have heard the testimony of Dr. McKinney today. Are you able to form any opinion, from hearing that testimony, as to whether or not this man had any functional disability to any extent at the time that Dr. McKinney saw him in 1929, having discharged him from diathermic treatments in 1929 and having made only an observation of the foot, feeling and manipulating it, in the summer of that year?

A. I could not form any definite opinion as to what the disability was, except that he had a limp.

Q. Would the fact that the man had been walking around with a cane and was walking around and had completed his positive treatments indicate to you that the functional disability was better than the estimate given by Dr. McKinney?

Mr. Donovan: I object to that question.

The Deputy Commissioner: What is the objection?

Mr. Donovan: The objection is, Mr. Commissioner, that he [fol. 72] wants him to state that because he had stopped the treatments of the man at that time that the Doctor's opinion was wrong. I do not think that the fact that the Doctor stopped the treatments in the summer of 1932 would in any way affect his opinion as to the extent of the disability.

By the Deputy Commissioner:

Q. Without examining the foot in 1932 would you be able to pass upon the condition of the foot and as to his disability?

A. No, sir. I just stated that I could not.

Mr. Myers: I understand the question has been stricken?

The Deputy Commissioner: Yes.

Mr. Myers: I think the Doctor has a right to give some opinion.

The Deputy Commissioner: You asked him to give an opinion upon the symptoms which Dr. McKinney saw. Go ahead and ask him a question.

By Mr. Myers:

Q. Are you able to form an opinion as to the functional disability to use his foot in the summer of 1929 or subsequent thereto, in view of the symptoms given by Dr. McKinney and in view of the fact that the positive treatments had ceased and that this man was using this foot and was using a cane? Are you able to express an opinion as to the functional disability?

A. I would rather not try to give any estimate of functional disability from the description. However, I would [fol. 73] presume that he must have had some residual stiffness of his foot, probably functional, but I don't know to what degree, because the examination does not give me enough details upon which to form any opinion.

By Mr. Myers:

Q. Are you able to state whether, from the details that were given to you, that functional disability was as high as 90 per cent. at that time?

A. If I may be allowed to express an abstract opinion, based entirely on hearsay, he certainly could not have had that much disability.

By the Deputy Commissioner:

Q. You mean from the fracture of the toes and any bruises that occurred at the time?

A. Yes.

Mr. Myers: I am asking the Doctor to give his opinion.

Mr. Donovan: The Doctor did not see the X-ray.

Mr. Myers: He saw the X-rays by Dr. McPeak, and the positions of the various fractures.

By Mr. Myers:

Q. Doctor, the disabilities that have been described in the X-ray of Dr. McPeak have been ascribed solely to the metatarsal?

A. No.

Q. I mean it applies only to the phalanx fractures?

A. Phalangeal fractures.

[fol. 74] Q. And not to the metatarsal fractures?

A. Yes.

Mr. Myers: I think that is all.

Cross-examination.

By Mr. Donovan:

Q. After the X-ray was taken by Dr. McPeak, of which you were informed, they would not show any injury to the fleshy part of the foot?

A. Never.

Q. If a heavy weight had fallen on his foot, breaking some of the bones, which would consequently——

The Deputy Commissioner: (Interposing) Just a moment. Where do you get any history in the case that a heavy weight fell on his foot?

Mr. Donovan: I am going to follow that up with the testimony——

The Deputy Commissioner: (Interposing) The records that I have before me show that there was a collision, but there was no description of a distinct injury to the foot.

Mr. Donovan: The Claimant will testify to that.

The Deputy Commissioner: All right. That will go in with the understanding that it will have to be supported by evidence.

Mr. Myers: You might ask the Doctor what history he obtained from the patient as to how the injury was sustained.

Mr. Donovan: All right.

[fol. 75] The Witness: This is the history: This patient is a truck driver and helper, who was injured December 15th, 1928, when a street car struck the truck in which he was riding, turned over the truck and pinned the patient's foot between the truck and the coping of the sidewalk.

By Mr. Donovan:

Q. The foot being crushed that way, would it cause an injury to the fleshy part of the foot; I mean the tendons and the other parts?

A. It might and it might not, because you can fracture the toe by a simple twist. Also, you have the protection of the shoe and of the sock. You might have wounds or not. You can fracture a toe by direct as well as indirect blows, so it does not necessarily follow that a fracture to the toe means an injury to the soft part.

Q. Would you say, under the circumstances this man was injured, that there was some injury?

A. The chances are that there was injury to the soft parts.

Q. That could have contributed to the disability?

A. That was a minor matter as compared with the injury to the toes.

Q. But it all contributed?

A. Yes.

Q. You said something about the plantar fascia of the foot. Where is that?

A. The plantar fascia is the ligament under the arch of [fol. 76] the foot.

Q. There was an injury there?

A. No.

Q. You found none there?

A. No.

By the Deputy Commissioner:

Q. You mean the cords were perfectly free and movable without any adhesions?

A. I mentioned that there was a tenderness there.

By Mr. Donovan:

Q. Tenderness?

A. Yes.

Mr. Donovan: That is all.

The Deputy Commissioner: That is all.

(Thereupon the witness was excused and retired from the witness stand.)

Thereupon——

ISAAC CHAPMAN, the Claimant herein, was called as a witness for and on his own behalf and, having been previously duly sworn by the Deputy Commissioner, as above indicated, assumed the witness stand and upon examination testified as follows:

Direct examination.

By Mr. Donovan:

Q. What is your full name?

[fol. 77] A. Isaac Chapman.

Q. You were on December 15, 1928, employed by the Palais Royal?

The Deputy Commissioner: I do not think that Mr. Myers is denying that. What are you going to prove by him?

Mr. Donovan: I am just going to ask him to state what was done after the accident for him and how long he had a cast on his foot and how long he had to use crutches.

The Deputy Commissioner: All right.

By Mr. Donovan:

Q. You were injured on December 15, 1928?

A. Yes, sir.

Q. While in a truck?

A. In a truck.

Q. Where were you treated?

A. At Emergency Hospital.

Q. What were you treated for, Mr. Chapman?

A. Well, they didn't do much to me that night, only bathed my foot and head—there was a scar. They sewed my head up (indicating).

Q. Did they give you any treatment for your foot other than bathing?

A. I had to go back the next day.

Q. What did they do on that day?

A. They took an X-ray, I think.

[fol. 78] Q. Did there come a time when they put a cast on your foot?

A. Yes, then they put a cast on. I think the next day they put a cast on.

Q. How long did that remain on there?

A. About four or five weeks—I would say about six weeks.

Q. How did you get around?

A. On—I used to go on crutches.

Q. During this time——

The Deputy Commissioner: (Interposing) That would be about the end of January?

Mr. Donovan: Yes.

The Witness: Yes.

By Mr. Donovan:

Q. Who treated you at the Emergency Hospital?

A. I don't know the doctor's name; different doctors at the time I went.

Q. You went to the clinic?

A. Yes.

Q. After the cast was removed were you able to use your foot freely?

A. No, sir.

Q. Did you have any artificial means to enable you to get around? Did you use a cane or crutches?

[fol. 79] A. I used crutches.

Q. How long were you going around on crutches?

A. Around six months I was on crutches.

Q. During that period were you able to put any weight on your foot?

A. No.

Q. You were not?

A. No.

Q. You just walked on one foot and the crutches?

A. Yes, and the crutches.

Q. During that period were you employed?

A. No, sir.

Q. How long was it after the accident before you could get around without the aid of crutches or a cane?

A. I will say about—I used crutches about six months and I used a cane about seven or eight months. Sometimes now I use a cane, in cloudy weather.

By the Deputy Commissioner:

Q. You mean you had crutches six months before you used a cane for seven or eight months after that?

A. Yes.

Q. What you were trying to say is that you used crutches and a cane about thirteen or fourteen months?

A. Yes, sir.

Q. After that did you have occasion to use the cane?

[fol. 80] A. Yes.

Q. How often, about?

A. Well, I didn't have any special time—every time my foot pained me I would use the cane.

Q. Did the weather contribute to the pain you suffered?

A. Cloudy weather, yes.

Q. What were the pains?

A. Pain would come through the instep at the bottom of my foot. Sometimes it would come up my leg as far as my knee, some time.

Q. During that period did you try to work?

A. No, sir.

By the Deputy Commissioner:

Q. Which foot was that?

A. The right foot.

By Mr. Donovan:

Q. Was that the foot that the cast was on?

A. Yes.

Q. Was that the foot which was treated at Emergency Hospital?

A. Yes

Q. Did you suffer, to the best of your knowledge, a fracture of the foot at any other time?

A. Since then?

Q. No; before or after that time?

[fol. 81] A. Before the accident?

Q. Yes.

A. No, sir.

Q. You never had any accident to it?

A. No.

Q. When was it that you first went to work after the accident?

A. Well, let's see; I got a job about two years after that.

Q. Where were you working, Mr. Chapman?

A. I was working for the Pan-Tex cleaners.

Q. Where is that?

A. Third and Florida Avenue, Northwest.

Q. What did you do?

A. I was driving a truck, delivering clothes.

Q. How long did you work there?

A. I worked about two weeks. Then I couldn't stand driving a car and I had to quit, so I used to go back and work at days—a couple of days a week.

Q. Why couldn't you stand driving the truck?

A. My foot used to swell on me. It seemed like the heat from the motor would do something to make my foot swell. It got so I could not get around; I had to give it up.

Q. Was that the first job you attempted to get after the accident?

A. Yes.

[fol. 82] Q. Did you apply for that job as soon as you thought you could get around?

A. Yes, sir.

Q. After that what work did you perform?

A. After that I didn't do anything until about eight or ten months ago.

Q. Eight to ten months ago?

A. Yes.

Q. During that time did you attempt to procure work?

A. Yes.

Q. You did?

A. Yes.

Q. That is, before the ten months' period?

A. No, sir.

Q. Why didn't you apply for work at that time?

A. Because my foot was bothering me all the time. I just felt that I could not do it.

Q. Was it paining you constantly?

A. Yes.

Q. During that period did you suffer pains in any part of your body?

A. My head.

Q. When did those pains first start?

A. They started, I will say, about six months ago. I started having those pains.

Q. In what part of the head did you suffer these pains?

[fol. 83] A. I had shooting pains like this (indicating),

grabbing me in the head from here (indicating) to the back of my head.

Q. Is that point you just indicated the place you suffered as the result of the injury?

A. Yes.

Q. In the hair?

A. Yes.

Q. When did that first start?

A. I will say about six months.

Q. After the accident?

A. Yes.

Q. Did they continue——

The Deputy Commissioner (Interposing): Just a moment. He said, in answer to a previous question, about six months ago.

Mr. Donovan: I am sorry, Mr. Commissioner; he misunderstood.

By Mr. Donovan:

Q. About six months ago they started?

A. Yes.

Q. How much did you earn while you were working for the Pan-Tex cleaners?

A. The two weeks I worked they give me $14 a week. Then when I worked two days a week they give me a dollar and a half a day.

Q. How many days did you work for them, approximately, at a dollar and a half a day?

[fol. 84] A. I will say about eight or ten days, off and on.

Q. Is that altogether?

A. Eight or ten days altogether, yes.

Q. You have not worked since about ten months ago?

A. Yes.

Mr. Donovan: That is all.

Cross-examination.

By Mr. Myers:

Q. Mr. Chapman, in 1929, when you first went to Dr. McKinney's, you saw Dr. McKinney yourself?

A. Yes.

Q. At that time did you have a cast on your foot?
A. No, sir.
Q. You had no cast on your foot?
A. No, sir.
Q. I think you testified you had a cast and it remained for six weeks.
A. Yes, I did. I didn't go there until they dismissed me from the hospital.
Q. You did not see Dr. McKinney until February, 1929?
A. I can tell you just exactly when I saw Dr. McKinney. It was some time in May.
Q. You did not see Dr. McKinney until May, 1929?
A. Yes, sir. I don't know what date, But I know it was May.
[fol. 85] Q. Then all his testimony is in error, is it?
A. It seems that we—That part is, I know. It was May when I went there.
Q. He did not see you until May, 1929?
A. Yes.
Q. How long did you go to him for treatments?
A. Well, I went there off and on for about four months.
Q. In other words, May, June and August, 1929, you went to Dr. McKinney?
A. Yes; about four months regularly I went to see him.
Q. What were you doing at his office?
A. Well, he just give me electrical treatments.
Q. Were you using crutches at the time you went to him in May, 1929?
A. Yes; I used crutches at that time.
Q. I beg your pardon?
A. I used crutches at that time.
Q. How long did you use crutches after you went to him?
A. I used them a month or so.
Q. After you went to him?
A. Yes.
Q. What sort of treatments did he give you?
A. He give me massages on my foot and electrical treatments.
Q. What sort of massage?
[fol. 86] A. I guess it was massage. He told me; I don't know what they were. He did some kind of electrical—He rubbed up and down my foot (illustrating).
Q. How often did you go to Dr. McKinney?
A. I have gone to him as much as three times a week.

Q. Up until August, 1929?

A. Yes.

Q. When did you see Dr. McKinney again after that for treatment for the foot?

A. I seen him about a month after that.

Q. In other words, in September, 1929, you saw him again?

A. Yes, sir.

Q. Did you go to him for treatments then?

A. Yes.

Q. What sort of treatment did you get from him then?

A. Same thing.

Q. When did you see him again after that?

A. I went off and on—I can't say just the time I saw him; it might have been two weeks or three weeks or a month; I can't say.

By the Deputy Commissioner:

Q. In September, you mean?

A. Yes.

By Mr. Myers:

Q. When did you see him again after that?

A. Then the next time I saw him I think I met him on the [fol. 87] street.

Q. When was that?

A. I don't know just when it was. He called me and I went and got in his car and he examined my foot; pressed down on it; he didn't do anything else.

Q. When did you see him after that?

A. Well, I didn't see him any more for a long time. I had a bad cold, and I went to him to get some medicine for a cold.

Q. When did you see him after that for your foot?

A. I didn't see him any more for my foot.

Q. In other words, after October, 1929 you did not see him for your foot?

A. October, 1929—Yes, I saw him since October, but I can't recall just when it was.

Q. Did you see him for treatments at that time?

A. Yes.

Q. How many times after October, 1929 did you see him for treatments?

A. I don't know how many times.

Q. Did anybody else treat you besides Dr. McKinney?

A. Not after I left the hospital.

Q. After you left the hospital was Dr. McKinney the only doctor attending you at that time?

A. Yes.

[fol. 88] Q. You do not know how many treatments he gave you in the latter part of the year 1929?

A. No, sir.

Q. Did he treat you in 1930?

A. Yes, sir.

Q. When did he treat you in 1930?

A. I don't know when it was, but he treated me on and off—let's see; about four months, off and on. He used to come to my house. I loved at 33 Florida Avenue.

Q. How many times did he treat you in 1930?

A. I can't say.

Q. What sort of treatments did he give you at your hours-?

A. Electrical treatments.

Q. He brought his electrical apparatus with him to treat you at your hours-?

A. Yes.

Q. Why did he come to your house?

A. Because I was feeling bad and I couldn't get out.

Q. Was that when he was treating you for this cold?

A. No; my foot.

Q. In 1930?

A. Yes.

Q. How often did you see him in the year 1930? Did he treat you?

A. I can't say how often.

[fol. 89] Q. Can you approximate how often he treated you?

A. It is hard for me to say, because I don't remember.

Q. When did he give you his last treatment?

A. I can't say that.

Q. Was it in 1930 or not?

A. Some time in 1932, I think, he give me the last treatment; I can't say; I think it was some time in 1932.

Q. Was it in 1932 that he examined you for the purpose of testifying in your trial? Isn't that what you mean by that? And not that it was your last treatment?

A. It might have been for that.

Q. He did not treat you; he examined you just before the trial for the purpose of testifying?

A. He treated me, too.

Q. What did he do for you?

A. He gave me electrical treatments.

Q. Did he give you any treatments in 1931?

A. Yes.

Q. You can't say how many treatments he gave you in 1930 and 1931, can you?

Mr. Donovan: He says he was treated; he can't remember how many times.

By Mr. Myers:

Q. What months did he treat you in?

A. I can't remember that.

[fol. 90] Q. Did you improve from your treatments? How were you feeling in the lat-er part of 1929?

A. They seemed to make me feel better for a while—two or three days—and then they would come right back on me.

Q. You do not feel any better right now than in 1931?

A. I feel much better now.

Q. When did you start feeling improved?

A. Only I have those pains through my head. I have them now at times.

Q. What did you do for the pains?

A. I take aspirins. I would have had X-rays taken, but I haven't the money.

Q. When were you married?

A. I have been married about two years.

Q. When were you married?

A. About two years ago.

Q. Before the accident? Did you marry since the accident?

A. Yes.

Q. Any children?

A. One.

Q. Born after the accident?

A. Yes.

Q. The first employment you sought after 1929 was some time in the fall of 1931, and you sought employment with the Pan-Tex cleaners?

[fol. 91] A. Yes.

Q. You worked for them how long?

A. About ten or twelve days.

Q. Two weeks or ten or twelve days?

A. Yes.

Q. The two weeks you earned $14 a week and for the ten or twelve days a dollar and a half a day?

A. Yes.

Q. You haven't sought any employment from since ten months ago?

A. Yes.

Q. Why didn't you seek any employment?

A. I wasn't able to work.

Q. You are absolutely disabled from doing any work at all?

A. The kind of work, sitting down, I couldn't get that.

Q. Did you try to do any work after you worked for the Pan-Tex cleaners?

A. That is all I tried.

Q. You did not try any other work?

A. No, sir. I could not do that; I knew I could not do the others.

Q. How long did you live at 33 Florida Avenue? Is that where you were living at the time of the accident?

A. Yes, sir.

Q. How long did you live there?

[fol. 92] A. Altogether, do you mean?

Q. When did you move away from there?

A. I moved away from there about four months after I got married—three or four months.

Q. What month of the year did you get married?

A. I can't remember that.

By the Deputy Commissioner:

Q. You do not know what day of the month you were married?

Mr. Myers: I don't care about the date; I will just be satisfied with the month of the year he was married.

The Witness: I can't remember.

By Mr. Donovan:

Q. It was after the trial of the case in the Supreme Court?

A. Yes.

Q. How long after that was it?

A. I have been married a little more than two years. About two years and two months, or something like that.

Q. You were married probably in March or April of 1932, right after the trial of that case?

A. I think it was March or April.

Q. You moved away from Florida Avenue about two months after that, which would make it up to August or September of 1932?

By Mr. Myers:

Q. Where did you move?

[fol. 93] A. 123 R Street, Northwest.

Q. 123 R Street, Northwest?

A. Yes.

Q. How much did you pay for rent there?

A. I think we was paying four dollars a month.

Q. Four dollars a month?

A. Four dollars a week.

Q. About $16 a month?

A. Yes.

Q. How long did you live at 123 R Street?

A. We lived there about six months or a year.

Q. Six months or a year? Which do you mean?

A. I don't remember just how long. I would say about that time?

Q. Where did you move from there?

A. Well, when my wife got money we moved on Quincy Place; 522 Quincy Place.

Q. Is that where you are living now?

A. Yes.

Q. What rent do you pay up there?

A. $37.50.

Q. Do you own a car now?

A. No, sir.

Q. You do not own a car at all?

A. No, sir.

[fol. 94] Q. Have you owned a car during this period of time?

A. No. sir.

Q. You have not owned any car during this period of time?

A. No, sir.

Q. You do not own a car with License No. P-865?
A. My brother.
Q. Is it in your brother's name?
A. Yes.
Q. That is listed in your brother's name or your name?
A. In his name.
Q. What sort of car is it?
A. Ford. He has not got it now. He has got a new car.

By Mr. Donovan:

Q. What is your brother's name?
A. Stephen Chapman.

By Mr. Myers:

Q. Did not you and your brother purchase a car together or two cars together during this period of time?
A. I signed for it, but it was his, in his name.
Q. The car was between you and your brother?
A. Yes.
Q. There were two cars purchased?
A. Yes.
Q. You purchased one in August, 1930, which was a Ford car?
A. Yes.
[fol. 95] Q. Then you purchased another one in July, 1931?
A. Yes.

Mr. Donovan: Wait a minute. He said he did not purchase them; he signed the contract.

By Mr. Myers:

Q. The cars were purchased and signed in your name and the title was held jointly by both of you?
A. It must have been. I don't have them.
Q. Did you ever drive a taxicab?
A. No, sir.
Q. Did you ever drive one of these cars as a taxicab?
A. No.
Q. Did you drive for your brother at all?
A. Just sometimes when we went out.
Q. Did you drive——

The Deputy Commissioner (Interposing): He said he drove it with his brother.

By Mr. Myers:

Q. Did you drive the car for your brother?
A. He drove it himself; sometimes I drive it.
Q. Did you drive it in 1930?
A. Yes, I did at times.
Q. You drove it at times in 1931?
A. Yes.
Q. These cars were sold to you and your brother, but your brother put up the money for them?
[fol. 96] A. Yes.
Q. You say you have not driven a taxicab at any time?
A. No, sir. Before the war——
Q. (Interposing): I am not talking about before the war. Since this accident you have not driven a taxicab?
A. No, sir.

Mr. Myers: That is all.

Redirect examination.

By Mr. Donovan:

Q. While you were being treated by Dr. McKinney did you pay the bills?
A. No, sir; I have — paid any bills.
Q. Did he bill you? Did he send you bills for the treatments?
A. No, sir; I do not think so.
Q. Do you know whether the bills have been paid?
A. I know that they have not, because he told me.
Q. Do you know whether he looked to you for the payment of them or not?
A. Yes.
Q. Do you know what the amount of the bills is?
A. Yes.
Q. How much are they for?
A. $91.10, he told me.

Mr. Myers: Under Section 7 of the Act, we are denying [fol. 97] liability for any medical bills.

The Deputy Commissioner: The report has not been made?

Mr. Myers: It has not. I have not ever seen the report.

Recross-examination.

By Mr. Myers:

Q. Were you examined by anybody else besides Dr. McKinney?

A. Yes.

Q. When were you examined and by whom were you examined?

A. Dr. Jack; he was here today.

Q. When did he examine you?

A. Just before I went to trial, and there was another doctor there. I don't remember his name.

Q. Do you know what he looked like?

A. Yes, sir; I know him when I seen him.

Q. What does he look like?

A. He is kind of a stout man; he has white hair.

Q. Is his name Dr. Larkin?

A. I think that is it.

Q. Did he examine you at the same time that Dr. Jack did?

A. I am not sure.

Q. It was in May, 1929. Was that the same day that Dr. Larkin examined you?

A. Yes, I think so.

Mr. Myers: I have no further questions.

Mr. Donovan: That is all.

[fol. 98] (Thereupon the witness was excused and retired from the witness stand.)

Mr. Myers: I do not know the value of having Dr. Larkin's examination, except that it shows that he examined him in May, 1929.

The Deputy Commissioner: Will Dr. Larin's testimony be cumulative with that of Dr. Hall's?

Mr. Myers: It will be, and the examination was made at the same time Dr. Jack made his; that is in May, 1929. I

would like to have this report go into the record for what it is worth.

The Deputy Commissioner: Mr. Myers; do you have the report of Dr. Larkin?

Mr. Myers: I haven't the original report; I have a carbon copy.

The Deputy Commissioner: Show it to Mr. Donovan and let us see if we can file that as being his testimony if he were here.

Mr. Myers: His testimony is practically the same as Dr. Jack's.

Mr. Donovan: That is all right.

The Deputy Commissioner: It may be marked as Respondent's Exhibit 1.

(Thereupon the paper referred to was received in evidence and marked Respondent's Exhibit 1, and is as follows:)

[fol. 99] RESPONDENT'S EXHIBIT 1

"May 4, 1929.

Isaiah Chapman, 33 Florida Avenue, N. W.

Patient states that he was injured December 16, 1927, the result of a street car accident at 4½ Street and Maine Ave. He was taken to Emergency Hospital where he was treated and returned home that night. He returned to the Emergency Hospital subsequently three or four times for treatment, and then was under the care of Dr. A. B. McKenney, colored, 1515 First Street.

His injuries consisted of fracture first right metatarsal, with dorsal deformity—2. Fracture outer table, right frontal bone. The right foot was in a cast for four weeks.

"Examination today reveals a small scar, medial surface mid-phalangeal joint, 1st metatarsal right. There is a slight deformity, but union is good, as well as all motions. There is a small scar mid-frontal regions ½ inch in diameter over the site of fracture, frontal bone. The scar is healed and not tender. The toes of both feet are moderately clawed.

Diagnosis. 1. Fracture first metatarsal, right, slight deformity.

2. Scar ½ inch in diameter, mid-frontal region, non-tender, non-adherent and non-productive of symptoms.

Opinion. The fracture of the large toe is healed, and it is my opinion that the patient will suffer from no permanent disability. The fracture of the outer table, right frontal bone is healed, with no permanent disability, except [fol. 100] the slight disfigurement from above mentioned scar, which is permanent.

Dr. A. B. McKinney, who was present at this examination has concurred in these findings.

(Signed) Edward Larkin.

The Deputy Commissioner: All right, the hearing is concluded.

(Thereupon, the instant hearing was closed.)

I hereby certify that the foregoing is a complete and accurate transcript of the shorthand report of the proceedings had and testimony presented at the described hearing, made by Nicholas Cinciotta, a competent shorthand reporter and a member of my staff.

H. S. Middlemiss, Official Reporter.

[fol. 101] In Supreme Court of District of Columbia

Motion of Robert J. Hoage to Dismiss Bill

Filed July 27, 1934

* * * * * * *

Now comes the defendant, Robert J. Hoage, deputy commissioner, United States Employees' Compensation Commission, by his attorneys, and moves this Honorable Court to dismiss the bill of complaint filed herein for the following reasons:

1. That the bill of complaint filed herein does not state a cause of action and does not entitle the plaintiff to any relief in law or equity.

2. That the bill of complaint with exhibits, including the transcripts of testimony of the hearings before the deputy

commissioner on April 26 and June 8, 1934, made a part of the bill by stipulation, shows that the compensation order of June 27, 1934, complained of in the bill, and made a part thereof as plaintiff's exhibit "D", is in accordance with law.

3. For such other good and sufficient reasons as may be shown.

Leslie C. Garnett, United States Attorney. John J. Wilson, Assistant United States Attorney, Attorneys for Defendant R. J. Hoage.

In Supreme Court of District of Columbia

Stipulation as to Exhibits "E" and "F" to Bill of Complaint

* * * * * * *

The Plaintiff and Defendant in the above-entitled action stipulate and agree to consider the transcripts of the testimony taken before Robert J. Hoage, Deputy Commissioner, United States Employees' Compensation Commission, on April 26, 1934, and on June 8, 1934, in the case of Isaac [fol. 102] Chapman v. The Palais Royal, Inc., Employer, and The Indemnity Insurance Company of North America, Insurance Carrier, Case No. 285-14 as exhibits to the bill of complaint filed herein, said transcripts of testimony to be identified as plaintiff's exhibits "E" and "F", respectively and prayed to be read as part of the bill of the Plaintiff herein.

James P. Donovan, Attorney for Plaintiff; Leslie C. Garnett, United States Attorney; John J. Wilson, Assistant United States Attorney, Attorneys for Defendant R. J. Hoage.

Memorandum re Intervention

August 6, 1934.—Motion of Indemnity Insurance Company for Leave to Intervene and Order granting same filed.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

INTERVENER'S MOTION TO DISMISS BILL

Filed September 7, 1934.

* * * * * * *

Comes now the intervener, Indemnity Insurance Company of North America, a corporation, by its attorneys, and moves this Honorable Court to dismiss the bill of complaint filed herein for the following reasons:

1. That the bill of complaint filed herein does not state a cause of action and does not entitle the plaintiff to any relief in law or equity.

2. That the bill of complaint with exhibits, including the transcripts of testimony of the hearings before the deputy commissioner on April 26 and June 8, 1934, made a part of [fol. 103] the bill by stipulation, shows that the compensation order of June 27, 1934, complained of in the bill, and made a part thereof as plaintiff's exhibit "D", is in accordance with law.

3. If the construction placed upon the compensation law by plaintiff be adopted, then the employer and insurance carrier would be deprived of substantial rights and of due process of law in that said employer would be prohibited from exercising his right of subrogation as granted by the compensation statute and this statutory right left wholly to the determination and/or whim of the employee in his pursuance of the third party remedy.

4. For such other good and sufficient reasons as may be shown.

Frost, Myers & Towers, Attorneys for Intervener.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

STIPULATION RE AMENDMENT OF BILL OF COMPLAINT

Filed November 1, 1934

* * * * * * *

It is duly stipulated by and between the parties hereto through their respective attorneys of record that para-

graph nine (9) of the bill of complaint filed herein, beginning with the second sentence in said paragraph, "Thereafter on the ninth day of May, 1934, etc.," and paragraph ten (10) be and the same is hereby stricken and in lieu thereof the following be and the same is hereby substituted:

"Thereafter, on, to wit, May 9, 1934, said motion coming on for hearing was denied by the Court and plaintiff thereupon through his attorneys of record by Præcipe duly filed in said cause discontinued said action against the Washington Railway & Electric Company, which action plaintiff [fol. 104] avers and says finally terminated said action."

Harlan Wood, James P. Donovan (HW), Attorneys for the Plaintiff, Isaac Chapman.

October 30, 1934.

J. J. Wilson, Ass't United States Attorney, Attorney for the Defendant, R. J. Hoage.

Frost, Myers & Towers, Attorneys for the Intervening Defendant, Indemnity Insurance Company of North America.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

FINAL DECREE

Filed November 19, 1934

* * * * * * *

This cause having come on to be heard upon the motions of the defendants to dismiss the bill of complaint, and, after argument by counsel for both parties, having been considered by the Court, it is by the Court this 19th day of November, 1934,

Adjudged, ordered and decreed, that the motions of the defendants to dismiss the bill of complaint be, and the same are hereby granted, and the said bill of complaint be, and the same is hereby dismissed.

F. Dickinson Letts, Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

NOTATION OF APPEAL

Filed December 4, 1934

* * * * * * *

The plaintiff, by his attorneys of record in the above entitled cause, notes an appeal to the Court of Appeals from the decree passed herein on, to wit, November 19, [fol. 105] 1934, and cost bond is hereby fixed in the penal sum of one hundred dollars ($100.00).

F. Dickinson Letts, Justice.

J. P. Donovan, Harlan Wood, Attorneys for Plaintiff, Isaac Chapman.

Citation is hereby waived.

J. J. Wilson, Ass't United States Attorney, Attorney for Defendant, R. J. Hoage.

Frost, Myers & Towers, Attorneys for the Intervening Defendant, Indemnity Insurance Company of North America.

Let the plaintiff prosecute his appeal and further proceedings in this Court without the prepayment of costs.

F. Dickinson Letts, Justice.

IN SUPREME COURT OF DISTRICT OF COLUMBIA

ASSIGNMENT OF ERRORS

Filed December 6, 1934

* * * * * * *

The plaintiff, Isaac Chapman, respectfully assigns as errors committed by the Court as follows:

1. The Court erred in holding that the plaintiff had abandoned his suit against a third party.

2. The Court erred in holding that the plaintiff's suit against a third party was dismissed because of his failure to prosecute it.

3. The Court erred in not holding that the plaintiff had by his election to sue a third party had not finally and completely determined his cause of action against the third party.

4. The Court erred in holding that the rights of plain-
[fol. 106] tiff's employer had been prejudiced by any act of omission or commission on plaintiff's part.

5. The Court erred in not holding that plaintiff's employer and the insurance carrier had not been prejudiced in their rights of action against a third party.

6. The Court erred in holding that the plaintiff had allowed the running of the statute of limitations, thereby prejudicing any rights of plaintiff's employer.

7. The Court erred in holding that the right of subrogation of the employer and the insurance carrier had been prejudiced by the prosecution and final discontinuance of the plaintiff's suit against a third party.

8. The Court erred in failing to give the plaintiff the presumption accorded him under section 20 (a) of the Longshoremen's Act.

9. The Court erred in denying the right of the plaintiff to compensation within the meaning and interpretation of the provisions of the Longshoremen's Act.

10. The Court erred in holding that the findings of fact of the Deputy Commissioner, dated June 27, 1934, were in accordance with fact and law.

11. The Court erred in dismissing plaintiff's Bill of Complaint.

Harlan Wood, J. P. Donovan, Attorneys for Plaintiff.

Service of a copy of the foregoing assignment of errors is acknowledged this 5th day of December, 1934.

J. J. Wilson, Ass't United States Attorney; Frost, Myers & Towers, Intervener.

[fol. 107] IN SUPREME COURT OF DISTRICT OF COLUMBIA

DESIGNATION OF RECORD

Filed December 6, 1934

* * * * * * *

The Clerk of the Court will please prepare and include in the transcript of record on appeal for the appellant in the above entitled cause the following:

1. The plaintiff's Bill for Mandatory Injunction with exhibits attached thereto.
2. Memo: Plaintiff's affidavit in forma pauperis.
3. Plaintiff's exhibits "E" and "F".
4. Plaintiff's stipulation amending Bill of Complaint, dated October 30, 1934 and filed Nov. 1, 1934.
5. Memo; Motion and order allowing Indemnity Insurance Company of North America to intervene.
6. Motion of defendant, Hoage, to dismiss Bill of Complaint.
7. Motion of intervener, Indemnity Insurance Company of North America, to dismiss plaintiff's Bill of Complaint.
8. Final decree granting motion of defendant and intervener dismissing plaintiff's Bill of Complaint.
9. Memo: Notation of Appeal and order allowing prosecution of suit in forma pauperis.
10. Plaintiff's assignment of errors.
11. This Designation.

Harlan Wood, J. P. Donovan, Attorneys for Plaintiff.

Service of a copy of the foregoing is accepted this 5th day of December, 1934.

J. J. Wilson, Ass't United States Attorney; Frost, Myers & Towers, Intervener.

[fol. 108] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 109] [File endorsement omitted.]

[fols. 110 & 111] Minute entries of argument, April 9th and 10th, 1935, omitted in printing.

[fol. 112] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 6412

(Argued April 9, 1935. Decided May 13, 1935)

ISAAC CHAPMAN, Appellant

v.

ROBERT J. HOAGE, Deputy Commissioner, District of Columbia Compensation District, United States Employees' Compensation Commission, and Indemnity Insurance Company of North America, a Corporation, intervener

Appeal From the Supreme Court of the District of Columbia

Harlan Wood, James P. Donovan, of Washington, D. C., for appellant.

Leslie C. Garnett, John J. Wilson, for Hoage; Norman B. Frost, Frank H. Myers, all of Washington, D. C., for appellee, Indemnity Ins. Co.

(Before Martin, Chief Justice; Robb, Van Orsdel, Hitz, and Groner, Associate Justices.)

OPINION

VAN ORSDEL, Associate Justice:

Appellant, plaintiff below, appeals from a final decree dismissing his bill of complaint for a mandatory injunction, filed under the provisions of the District of Columbia workmen's compensation law,[1] against defendant Hoage, Deputy Commissioner of the United States Employees' Compensation Commission. The Indemnity Insurance Company of North America was permitted to intervene. For convenience, appellant will be referred to as plaintiff, the appellee as defendant, and the Insurance Company as intervener.

---

[1] Longshoremen's and Harbor Workers' Compensation Act (act of March 4, 1927, 44 Stat. 1424), as made applicable to the District by the act of May 17, 1928 (45 Stat. 600).

It appears that plaintiff sustained injuries on December 5, 1928, while employed by the Palais Royal Company of Washington, D. C., as a helper on a delivery truck, for which the intervener was the insurance carrier. On June 10, 1929, plaintiff filed with defendant a notice of his election to sue a third party, namely, the Washington Railway [fol. 113] & Electric Company. Suit was instituted July 18, 1929; and on trial in the Supreme Court of the District plaintiff obtained a judgment for $3,000 against the third party. On appeal the judgment was reversed by this court. Washington Railway & Electric Company v. Chapman, 62 App. D. C. 140. An application to the Supreme Court of the United States for a writ of certiorari was denied October 9, 1933. The mandate of this court reversing the judgment was accordingly transmitted to the Supreme Court of the District.

Plaintiff then requested a hearing on his claim for deficiency compensation, and the matter was heard before the Deputy Commissioner on April 26, 1934. At this hearing the insurance company raised the question of jurisdiction on the ground that plaintiff had not pursued his third party remedy to final judgment. The deputy commissioner continued the hearing without a definite ruling, intimating however his approval of the position taken by the insurance company. Plaintiff then filed a motion in the railway company suit to proceed further "without payment of accrued or future costs" for the purpose of having this cause "determined as a matter of record." This motion was denied by the court.

Plaintiff, instead of proceeding to a new trial and securing a final judgment, petitioned the court to proceed in forma pauperis. His petition was denied, and he took no further steps to secure his right to thus proceed to a new trial. The denial of the right to proceed in forma pauperis did not amount to a final judgment either in that matter, or in the suit against the railway company. The court doubtless denied the petition on the theory that, in view of the decision in the appellate court, further proceedings against the railway company would be fruitless; but notwithstanding the apparent obstacle to success, plaintiff, if he had insisted on his rights, was entitled to a new trial.

Abandoning this step to procure a final judgment, plaintiff, on March 1, 1934, renewed his application for compensation. Hearings were had, and on June 27, 1934, defend-

ant denied plaintiff compensation on the ground "that the claimant, having filed his election to pursue his remedy against the third party, and having failed to pursue his remedy to completion, has prejudiced the rights of the employer herein by allowing the statutory limit to run against any rights the employer might have had, and the claimant therefore is not entitled to compensation within the meaning of the act."

On May 9, 1934, the plaintiff by præcipe duly filed, discontinued his action against the Washington Railway & Electric Company and filed his bill in equity for a review of the award and for a mandatory injunction against defendant Commissioner. Whereupon defendant Hoage moved to dismiss the bill on the ground that his compensation order of June 27, 1934, complained of in the bill, is in accordance with law. The intervener joined in the motion of defendant to dismiss. The court, on hearing, entered a decree dismissing plaintiff's bill, and from the decree this appeal was taken.

Plaintiff elected to proceed under section 33 of the Longshoremen's & Harbor Workers' Compensation Act, 44 Stat. 1440, which provides as follows:

"SECTION 33. [(a)] If on account of a disability or death for which compensation is payable under this act the person [fol. 114] entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

* * * * * * *

"(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 13, the employer shall be required to pay as compensation under this act a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against such third person.

"(g) If a compromise with such third person is made by the person entitled to compensation or such representative

of an amount less than the compensation to which such person or representative would be entitled to under this act, the employer shall be liable for compensation] as determined in subdivision (e) [only if such compromise is made with his written approval."]

The statute of limitations having run in favor of the employer and the insurance carrier, plaintiff was required to pursue his action against the railway company to a final judgment. Not having done this, plaintiff is in no position now to seek compensation through defendant commissioner. Counsel for defendant relies chiefly upon decisions of the New York courts where the statute is substantially similar to the Federal statute here involved. These courts take the extreme position that plaintiff having elected to pursue the third party, could not under any circumstances discontinue that case before final judgment, without the consent of the employer and carrier, and thereafter claim compensation. Kavanaugh v. Belden, 231 App. Div. 412; Breital v. Hinderstein et al., 236 App. Div. 203, 258 N. Y. S. 237; Cole v. Gold Metal Cone Co., 258 N. Y. S. 239.

With this construction of the statute we are not in agreement. The New York statute contains the provision that an injured employee "shall, before any suit or any award under this chapter, elect either to take compensation under this chapter or to pursue remedy against such other" third person. This provision, compelling election, is not contained in the Longshoremen's Act. It furnishes, however, a remote basis for the extreme holding of the New York courts in interpreting their act.

This distinction between the Federal statute and the New York statute is clearly stated by the Circuit Court of Appeals of the Second Circuit in the recent case of American Lumbermans' Mutual Casualty Company v. Lowe, Deputy Commissioner, et al., 70 Fed. (2d) 616. In that case the plaintiff elected to bring an action against the third party, but later, and before the statute of limitations had run, discontinued her suit and proceeded for compensation before the Commissioner. Her right to proceed before the Commissioner, not having pursued her case against the third party to final judgment, was denied by the District Court on the authority of the New York decisions. The Court of Appeals, however, held, and we think properly, that so long as the rights of the employer or carrier had not been preju-

[fol. 115] diced by the running of the statute of limitations, the act of discontinuance would not prevent the plaintiff from pursuing her remedy before the Commissioner.

On this point the court said: "It is evident that either an acceptance of compensation under (b) or a compromise with a third person and without written consent of the employer under (g) constitutes a final election that will bar other remedies. But there is nothing in (a) suggesting that bringing an action against the third person amounts to a final election. Nor, in the absence of such delay as will prevent the employer or its carrier from effectively availing themselves of their rights against the third person by way of subrogation, would there seem to be adequate reason for depriving a person entitled to compensation of the right to discontinue her action and seek compensation under the statute. Such a locus poenitentiae is ordinarily available, where separate remedies against different persons exist."

The present case, however, is in conflict with the exception laid down in the Lowe case, since the running of the statute of limitations intervened, while the suit for damages was pending against the railway company. The election of plaintiff to bring suit against the third party, and his failure to pursue that remedy to final judgment, with the intervention of limitations, bars his right to recover compensation under the statute.

The decree is affirmed.

Josiah A. Van Orsdel, Associate Justice.

Dissenting Opinion

Groner, J., dissenting: I am unable to agree in the conclusion of the court.

Petitioner (appellant) was employed by the Palais Royal Company of Washington as a helper on a delivery truck. Intervener was the insurance carrier. Petitioner was injured in the course of his employment—there was a collision between his truck and a street car—and elected to sue the alleged third party wrongdoer. In apt time he filed with the Deputy Commissioner notice of his election and of his purpose to claim any deficiency between the amount recovered and the amount he might be entitled to receive under the Compensation Act. This was all done in exact accordance with the provisions of the act.

On the trial of his action against the street railroad company he obtained a verdict for damages, on which judgment was entered. On appeal, we reversed the judgment, and certiorari was thereafter denied by the Supreme Court. Petitioner then made application to the Deputy Commissioner for compensation. The employer and the insurance carrier (intervener) answered and objected to an award on the ground that the deputy had no jurisdiction because petitioner had not exhausted his third party remedy. At this point, the record shows that the deputy, obviously in doubt, adjourned the hearing until the question of "court procedure" was definitely determined.

Petitioner thereafter, through his attorneys, moved the Supreme Court of the District to allow him to proceed in the law action without the payment of costs, alleging in sup- [fol. 116] port of the motion that he had been unable to work since his injury and was without the means of paying the costs of the litigation. The judge of the lower court before whom the action was pending denied the motion—I have no doubt, only because he considered the further prosecution of the action bootless, and suggested that petitioner claim compensation under the act. Petitioner thereupon submitted an order of discontinuance, which was entered, and he again applied to the deputy for compensation. At the conclusion of this hearing the deputy entered an order refusing his application on the ground that petitioner not having prosecuted his third-party remedy to completion, i. e., having discontinued his third-party action, and the statute of limitations having run, the rights of the employer to subrogation were prejudiced and petitioner's right to compensation lost.

Petitioner then applied to the Supreme Court of the District for a mandatory injunction, which being refused, he appealed to this court.

I think the writ should issue. The statute (Act of March 4, 1927, Sec. 33; 33 U. S. C. A., Sec. 933) provides:

"(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the Commission of his election and institutes proceedings within the period prescribed in section 913 of this chapter, the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Commission determines is

payable on account of such injury or death over the amount recovered against such third person.

"(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval."

Other than subsection (g), supra, there is no provision in the statute which makes final the election of the injured to pursue the third party remedy, and in that section the penalty is confined to cases of unauthorized compromise; so that the effect of our decision is to hold—wholly outside any express provision of the act—that if the dismissal against the third party results in prejudicing the rights of the employer, the latter cannot be required to pay compensation. Some of the cases cited in the opinion sustain this view. But even if the proposition is conceded, I can find in this record no facts to justify its application. On the contrary, the record, as I view it, shows affirmatively that the dismissal of the action did not and could not prejudice the employer or the insurance carrier, and this, for the simple reason that they lost nothing by it.

By reference to our opinion in the damage suit it will be seen that our reversal was on the merits and that we held, first, that petitioner was guilty of contributory negligence and, secondly, that the street railroad company was guilty of no negligence at all. It is true we remanded the case to the Supreme Court of the District for a new trial, as we are required to do, but it is perfectly obvious from the language of the opinion that our decision was to all intents and purposes a final adjudication against the right to recover. [fol. 117] While, therefore, it may be correctly said that the litigation begun by petitioner against the third party was not technically concluded untll further proceedings were had in the trial court, such proceedings, if had, must necessarily have gone against petitioner except in the event he was able to make out a wholly different case; and the record in the hearings before the deputy shows nothing on which to base even a conjecture to that effect but, on the other hand, shows that his main witness—the driver of the truck

at the time of the collision—was no longer available because of his death.

[In these circumstances, unless the whole purpose of the act be disregarded, the burden of showing loss or damage through the dismissal of the action ought to be placed on the insurer; for unless damage to it is shown, petitioner's right to discontinue the third party action and claim compensation is unchallenged. To be discharged of his statutory obligation, the employer must show, not only the dismissal of the third party action and the loss thereby of its right of subrogation but, in my view, must go further and show that the lost right of subrogation resulted in damage to the employer. Here there is no proof of any actual damage but, on the contrary, an inescapable conclusion there was none.

Judge Hitz concurs in this dissent.

A true copy. Test:

——, Clerk, United States Court of Appeals for the District of Columbia.

[fol. 118] In United States Court of Appeals for District of Columbia, April Term, 1935

No. 6412

Isaac Chapman, Appellant,

vs.

R. J. Hoage, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission, and Indemnity Insurance Company of North America, a Corporation, Intervener

Decree—May 13, 1935

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged, and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, affirmed.

Per Mr. Justice Van Orsdel.

May 13, 1935.

Dissenting Opinion by Mr. Justice Groner concurred in by Mr. Justice Hitz.

[fol. 119] IN UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA

[Title omitted]

ORDER STAYING MANDATE—May 29, 1935

On consideration of the motion for a stay of the mandate herein, pending application for certiorari, It is ordered by the Court that the mandate be and it hereby is, stayed for 30 days under Rule 24.

[fol. 120] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[Title omitted]

DESIGNATION OF RECORD—Filed May 27, 1935

The Clerk will please prepare a transcript on application for certiorari to the Supreme Court of the United States in the above entitled cause, including therein the following:

1. The record in the Court of Appeals.
2. Minute entry showing argument of cause.
3. The opinions of the Court of Appeals.
4. Judgment of the Court.
5. Minute entry showing motion to stay proceedings pending application for writ of certiorari.
6. This designation.
7. The certificate of the Clerk of the Court of Appeals.

Harlan Wood, J. P. Donovan, Attorneys for Isaac Chapman.

[fol. 121] Service of a copy of designation of record is acknowledged this — day of May 1935.

Leslie C. Garnett, U. S. Atty., Frost, Myers & Towers, Attorneys for Appellees.

[fol. 122] [File endorsement omitted.]

[fol. 123] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 124] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia, is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 39,705. District of Columbia, U. S. Court of Appeals. Term No. 151. Isaac Chapman, Petitioner, vs. R. J. Hoage, Deputy Commissioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission et al. Petition for a writ of certiorari and exhibit thereto. Filed June 21, 1935. Term No. 151 O. T. 1935.

FILE COPY

JUN 21 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 151

ISAAC CHAPMAN,

Petitioner,

vs.

R. J. HOAGE ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF.

HARLAN WOOD,
Counsel for Petitioner.

JAMES P. DONOVAN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935.

No. 151

ISAAC CHAPMAN,

Petitioner,

vs.

R. J. HOAGE ET AL.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Isaac Chapman, respectfully shows unto this Honorable Court:

I.

That your petitioner instituted a suit in equity in the Supreme Court of the District of Columbia for a mandatory injunction against R. J. Hoage, Deputy Commissioner of the United States Employees' Compensation Commission, for the purpose of requiring said Deputy Commissioner to make an award of compensation due him under the provisions of the Act of Congress of March 4, 1927 (44 Stats. 1424), as amended by the Act of Congress, May 17, 1928 (45 Stats. 600), and known as the Longshoremen's and Harbor Workers' Compensation Act.

In the original suit in the Supreme Court of the District of Columbia the *real* defendant, namely, the Indemnity Insurance Company of North America, was permitted to intervene.

On December 15, 1928, the petitioner received serious and permanent injuries in the course of his employment. Under the provisions of the Longshoremen's and Harbor Workers' Compensation Act the petitioner duly and timely filed a notice of his election to sue a third party, namely, the Washington Railway and Electric Company, upon the Commissioner's prescribed form. Suit was filed against the Washington Railway and Electric Company in the Supreme Court of the District of Columbia and a judgment of Three Thousand ($3,000.00) Dollars was obtained against the third party. The third party appealed to the Court of Appeals of the District of Columbia, and the judgment of the Supreme Court was reversed (*Washington Railway and Electric Company* v. *Chapman,* 62 App. D. C. 140, 141, 142, 62 F. (2d) 486). In reversing the judgment of the Supreme Court of the District of Columbia, the Court of Appeals of the District of Columbia in the action against the third party at page 141, among other things, said:

> "That they were guilty of contributory negligence in driving upon the track, under these conditions, is in our opinion beyond question."

And again at page 142, notwithstanding the legal anomaly, the Court of Appeals, among other things, said:

> "There is nothing here to establish any negligence on the part of the defendant in the operation of its car or the failure to do anything after discovering the peril of the driver of the truck by which the accident might have been avoided."

Mr. Justice Van Orsdel wrote the opinion of the Court of Appeals in the case of *Washington Railway and Electric*

Company v. *Chapman* (your petitioner). He also wrote the majority opinion of the court in the instant case, the court being divided, three Justices in favor of the majority opinion and two the minority opinion.

On October 9, 1933 (four years, nine months, and twenty-nine days after the cause of action of Chapman accrued), this Court, in Petition No. 316, denied certiorari to the Court of Appeals of the District of Columbia in the case of your petitioner vs. Washington Railway and Electric Company, and thereby affirmed the judgment of the Court of Appeals, reversing the judgment of the Supreme Court of the District of Columbia.

On May 9, 1934, the petitioner discontinued by præcipe duly filed its law cause against a third party, and thereafter on June 27, 1934, had a hearing and presented his evidence for compensation before the Deputy Commissioner. The Deputy Commissioner on the 27th day of June, 1934, entered an order denying compensation and assigned as his reason therefor the following:

> "That the claimant, having filed his election to pursue his remedy against a third party and having failed to pursue his remedy to completion, has prejudiced the rights of the employer herein by allowing the statutory limit to run against any rights the employer might have had, and the claimant therefore is not entitled to compensation within the meaning of the Act." (R. 74, 75.)

There was no evidence before the Commissioner either of what at the time constituted the Statute of Limitations or whether in any action brought by the employer in the name of the employee against a third party that the Statute of Limitations might be pleaded as a defense. Neither did the Commissioner take any notice of the judgment of the Court of Appeals affirmed by this Court, reversing the judgment of the Supreme Court of the District of Colum-

bia, which held in effect that Chapman, the petitioner herein, had no right of recovery against the defendant.

Whereupon, the present suit was instituted for a mandatory injunction. The defendants moved to dismiss the petitioner's Bill of Complaint and set up among other things as grounds that the Compensation order of the Deputy Commissioner was in accordance with law. (R. 67-68.)

It is from the judgment of the Court of Appeals affirming the final decree of the Supreme Court of the District of Columbia that this petition is directed.

The insurance carrier at the hearing before the Deputy Commissioner admitted plaintiff's injury, the relationship of employer and employee, the applicability of the Act of Congress, the time of injury, the sustaining of injuries during the course of employment, notice of the injury, and the rate of wages allowed. It denied the plaintiff's permanent disability or for the length of time alleged. (R. 6.)

II.

The grounds upon which this petition is based are as follows:

1. The judgment of the United States Court of Appeals for the District of Columbia as expressed in the majority opinion is not a true and proper legal construction of the Longshoremen's and Harbor Workers' Compensation Act by reason of the fact that the Court has legislated into the Act by judicial construction language not contained in it, which transforms it in its effect and policy contrary to the original purpose and intent of the Act, thereby striking down its remedial character which it should afford by the Courts' strict technical interpretation according to substantive law.

2. The United States Court of Appeals for the District of Columbia erred as a matter of law in holding that a

suit by an injured employee against a third party under the aforesaid Act of Congress had to be determined by a final judgment in a Trial Court prior to his recovery of any compensation in a case where there is no assignable fault for the injuries sustained by the employee, there being no such language in the Act.

3. The United States Court of Appeals for the District of Columbia by the majority opinion and judgment entered in this cause departs from the clear intent and purpose of the aforesaid Act of Congress as judicially construed by it and the other Federal Courts of the United States; this Act being a Federal Statute and applicable in all Federal jurisdictions and being of such importance to the many thousands of employees so engaged in the activities annunciated by it is of tremendous and widespread general importance so as to justify in the humble opinion of counsel a judgment of this Court and the charting of a course of action for the Federal Judiciary which should construe it in its proper administration and the fair administration of justice generally.

4. The majority opinion of the United States Court of Appeals for the District of Columbia is contrary to the spirit of its previous decisions in construing the aforesaid Act of Congress and causes a divergence or contrariety of opinion in the Appellate Courts of the United States and particularly as expressed by the unanimous opinion of the United States Circuit Court of Appeals for the Second Circuit in the case of *American Lumbermen's Mutual Casualty Company* v. *Samuel S. Lowe et al.*, 70 F. (2d) 616.

5. The majority opinion and judgment of the United States Court of Appeals for the District of Columbia places a legal misconstruction on the law of *subrogation*.

6. The majority opinion and judgment of the United States Court of Appeals for the District of Columbia in

the absence of any evidence whatsoever wrongfully holds that it is not the duty of an insurance carrier to establish affirmatively any prejudice or damage resulting to it by evidence which must necessarily be the case in order to sustain any cause of action by way of subrogation.

7. The majority opinion and judgment of the United States Court of Appeals for the District of Columbia without any warrant of law held that the discontinuance of the petitioner's cause of action in the light of its own judgment (62 App. D. C. 140, 142) did not constitute for all legal and practical purposes a final determination of his cause of action.

8. The majority opinion and judgment of the United States Court of Appeals for the District of Columbia without any warrant of law attempts to foresee and prophesy the problematical filing of the plea of the Statute of Limitations as a defense in the event the Washington Railway and Electric Company might have been sued in the name of the petitioner to the use of his employer under the provisions of the aforesaid Act of Congress, although in this case there was no evidence that the Statute of Limitations had begun to run.

9. The United States Court of Appeals for the District of Columbia wholly and totally fails to give the plaintiff the benefit of the presumption accorded him under Section 20 of the aforesaid Act of Congress.

III.

ARGUMENT AND AUTHORITIES.

Longshoremen's Act Misconstrued.

Grounds One (1), Two (2), Three (3).

For the convenience of this Court and the purposes hereof, the assigned errors will be grouped.

This is the second time this paupered petitioner on the same facts though against different parties has knocked at the door of this Court for relief. His first petition (No. 316) was denied (October 9, 1933). In the name of justice, it is to be hoped that this petition will be granted by this Honorable Court.

In the economy of time the facts in the case will be adopted from the two opinions of the court below with the exception that the injury occurred on December 15, 1928, application for hearing before the Deputy Commissioner was April 26, 1934; the cause was not abandoned on March 1, 1934, nor as a fact is it abandoned yet until this Court passes upon the question involved; a hearing was had on June 8, 1934, before the Deputy Commissioner; the legal conclusions of the majority opinion unsupported by authority and contrary to the beneficent purposes, remedial spirit, and humane intent of the Act in question cannot be shared by the petitioner.

While counsel would not presume to be critical of the proprieties of the Justice who wrote the majority opinion of the court below because he had previously passed upon the facts for the court in the same case against the third party (*Washington Railway and Electric Company* v. *Chapman*, 62 App. D. C. 140), it is worthy of passing observation particularly in view of the legal amphibia wherein he said on page 141 of that opinion that Chapman (the appellee) was guilty of *contributory negligence* and on page 142 he said there was not negligence on the part of the appellant.

The Act in question is remedial. It calls for a liberal construction. It is intended to give relief where one is injured through *no assignable fault*. Doubts should be resolved in favor of the injured employee. *Liberty Mutual* v. *Hoage*, 62 App. D. C. 189, 190; *Standard Accident Insurance Company* v. *Hoage*, 62 App. D. C. 245, 247 (citing *Allan-Garcia Co.*, v. *Industrial Commission*, 334 Ill. 390;

166 N. E. 78; *Texas et al.* v. *Tyler,* 283 S. W. 929, 932, 933); *Fidelity and Casualty Co.* v. *Burrus,* 51 App. D. C. 228, 230. Such are the decisions of the United States Court of Appeals for the District of Columbia. The Act may be searched from cover to cover and nowhere in it does it require a case to be reduced to final judgment by the Trial Court where an election is made. This is ably and truly stated by the learned Justice who wrote the minority opinion of the court when he said *"wholly outside any express provision of the Act."* (R. 80.) To require it judicially is to allow the court below to legislate language in the Act and on the other hand to destroy the very purpose Congress had in mind in its passage. The sound and just reasoning of the minority opinion of the court below must make its appeal in the breast and heart of the Chancellor. Otherwise, as it says, the 'whole purpose of the Act is disregarded.'

The Law of Subrogation Misconstrued.

Grounds Four (4), Five (5), Six (6).

It will not trouble this Court in concluding that the intervenor is the real party in interest; the Deputy Commissioner is merely an administrative government employee possessing quasi-judicial powers. The substantive law of subrogation and it is no different under the Longshoremen's Act, but by its terms restricted for its application and conditioned upon the *recovery of damages* by the injured employee against a third party (see Act Section 33 (a), (b), and (f); R. 76) involves three elements, (a) a valuable right, (b) a person who owns the right, and (c) a person who is seeking to be substituted in that ownership. *Belnap Hardware and Manufacturing Co., et al.* v. *Ohio River Contract Co. et al.,* 271 Fed. 144, 146.

What have we in this case? No valuable right. Why? Because the Court of Appeals for the District of Columbia has passed upon the merits of this case (62 App. D. C. 140, 141) and held as a matter of law that the petitioner was guilty of contributory negligence (R. 80). Consequently, the intervenor has no right. In the name of Heaven, how can it be said that the intervenor, who might if the petitioner had recovered damages have become the subrogee, has been prejudiced or damaged?

The court below in the suit by petitioner against the third party held that the third party was guilty of no negligence; consequently, petitioner did not own any right. Then element number one is absent. The only element present is the third one (intervenor) who by a strained fiction and the judicial legislation of the court below seeks to be substituted in the ownership of something non-existent.

The majority opinion and judgment of the court below is contrary to the unanimous opinion and judgment of the Court of Appeals for the Second Circuit in the case of *American Lumbermen's Mutual Casualty Co.* v. *Lowe, Deputy Commissioner et al.*, 70 F. (2d) 616. Mr. Justice Hand there said:

> "In our opinion some prejudice to the employer or to the carrier from the discontinuance of the action ought to be shown in order to render the initial election unalterable."

Counsel for the petitioner can conceive of a situation where the right of subrogation might be prejudiced, as in a case where action was filed and no process served, or where a suit was filed and the plaintiff did not present himself for trial, or where an election was filed and no action was taken; in such cases, if a substantial right of subrogation existed, it would be defeated by the running of the

Statute of Limitations if pleaded. It is submitted that no such situation is before this Court.

There are numerous excerpts stating general principles of law arising under the Employees' Compensation laws of the State of New York in New York citations. Salutary as those general principles may be, it is submitted that they have no practical application to the law and facts in this case. It is submitted that the right of subrogation referred to in our Statute implies not an empty right to enter suit, but a substantial right to recover something of value in order to help make whole any loss the insurance carrier may suffer as the underwriter of the employer. The New York authorities are appropriately criticized in the language of Mr. Justice Adkins as he criticized them in the case of Van Duesen v. Hoage, Equity No. 58,030, of the Supreme Court of the District of Columbia, to the effect that from those New York cases it is not shown that a substantial right had been prejudiced. In the opinion of Mr. Justice Adkins in the Van Duesen case, he says:

> "Counsel for each of the defendants in their briefs cite several New York cases in support of the position taken by the Deputy Commissioner.
>
> "In some of those cases the right of action against the third person had been barred by the Statute of Limitations, and the Court based its decision on the ground that, by claimant's failure to go on with the action against the third person, the carrier had been deprived of a *substantial right* which it would have had but for the election, namely, 'its right of subrogation to claimant's remedy against the third party.'
>
> "In those cases it did not appear affirmatively that *the right of subrogation was valueless. If the right of subrogation is without value it cannot be described as a substantial right.*
>
> *"Where it has been demonstrated that there is no hope of collecting any money by virtue of a suit against the third person, I think the requirement of section 33*

(*f*) *is excused* and that claimant's action in not suing does not deprive him of his remedy here.

"Therefore, the motion to dismiss is overruled." (Italics supplied.)

In the Van Duesen case, a notice of election was filed as prescribed by the Longshoremen's Act, but in another suit against the same third party by one injured in the same accident it was made to appear that the third party was judgment-proof. Then the election was abandoned, no suit was filed, and successful recourse was had against the insurance carrier. In the instant case, suit was filed, judgment obtained, judgment defended in the Court of Appeals of the District of Columbia and even prosecuted to the Supreme Court of the United States in Chapman's endeavor to sustain the judgment for the benefit of the intervenor. Chapman, it has been judicially determined, was guilty of contributory negligence, which barred his right of recovery and which denies for all time the assumed conclusion on the part of the Deputy Commissioner and the Court and the intervenor that a right existed which, it is further assumed, has been prejudiced. The decree below affirms these assumptions and conclusions.

How just and impeccable is that reasoning of Mr. Justice Adkins and how legally true is it confined to the terms of the Act?

The right of election is destroyed should the congestion of dockets of the Courts involved prevent a final judgment before the expiration of three (3) years. It may be observed in this connection that the finding of fact of the Deputy Commissioner, if sustained, would render ineffective the right of election of an injured employee if he should enter suit against a third party, provided in that litigation three years were consumed in its successive prosecutions from the Trial Court to the Supreme Court of the United

States. A party litigant cannot control the progress of the trial of cases in the Supreme Court of the District of Columbia or its Court of Appeals. Neither can he control the action or the time of it of the Supreme Court of the United States when it passes upon an appeal or upon an application for a writ of certiorari. Neither can he prescribe the time limits provided for by the various rules of Court for these Courts. Such powers are vested in the legislature and the several Courts involved. By the same token, certainly a Deputy Commissioner has no such power and it is submitted that he may not have such a power and thereby defeat the humane purposes of a remedial statute. It may be repeated here that certiorari was denied by the Supreme Court on October 9, 1933, more than four years and ten months after the date of the plaintiff's injury.

Nowhere does it affirmatively appear that the intervenor has been prejudiced in any right. There is no evidence that the Statute of Limitations runs from the expiration of three years—merely an observation on the part of intervenor's counsel. No pretense is made of any actual damage to it.

It is a demonstrable and indisputable fact that the intervenor has not only not been prejudiced but has been actually benefited by the *petitioner*. How? Petitioner was not required to seek damages in the first instance from a third party. Resort against intervenor was immediate. The result could have been that during all these years intervenor would have been paying petitioner. In addition thereto, the Act does not provide for the payment of any interest. Intervenor through the passing years has had the benefit of money now due petitioner. And in further addition, petitioner, deprived of what he might have had under the statutory and contractual obligation of the intervenor, has to his detriment and at his expense litigated even to

this Court to sustain his original judgment against the third party which in the end would have inured to the benefit of the intervenor. It would have received credit for the $3,000.00 verdict and been liable only for the deficiency. Aren't these simple annunciations benefits?

The Appellate Judgment Was Final.

Ground Seven (7).

The judgment of the Court below in *Washington Railway and Electricity Company* v. *Chapman,* 62 App. D. C. 140, 142, and affirmed by this Court in the denial of certiorari in No. 316 between the same parties on October 9, 1933, is to all intents and purposes a final judgment (R. 75, 80). If the case had been retried, of what avail would it have been to petitioner or intervenor? It would have, however, cost the Government money and further delayed petitioner's just claim for compensation. It would have been the solemn duty of the Trial Court to have directed a verdict against the petitioner upon a retrial. The minority opinion characterizes it as "bootless". The majority opinion characterizes it as "fruitless". It would have been a challenge to counsel's sanity. It is confidently known that this Court cannot be troubled with the constitutional necessity for the Court below in reversing the Trial Court that the law cases be returned for further proceedings. A judgment under the facts in this case and the judicial determination of it could not make a perfunctory judgment of the Trial Court of any sustaining legal value.

Limitations Must be Pleaded, etc.

Grounds Eight (8) and Nine (9).

Now we come to a proposition so fundamentally elementary that counsel dislikes to make reference to it. By

virtue of what power inherent or legislated could the Court prophesy the problematical filing of the plea of the Statute of Limitations as a defense should the intervenor have indulged in the violent assumption that it had any right of subrogation to sue the Washington Railway and Electric Company. Courts cannot prophesy. Courts deal with past events. Statutes of Limitations do not bar a right. They destroy, when specially pleaded, the means of recovery. Unless pleaded they are waived. They are statutes of repose. Such is the practically universal rule. 37 C. J. 1213. Notwithstanding this accepted rule of law and wholly in the absence of any evidence, the majority opinion and judgment of the Court metamorphizes it to the everlasting damage to petitioner unless this Court intervenes and starts the wheels of plain and unadulterated justice moving in the right direction. The majority opinion and judgment of the Court below literally slaughters those favorable presumptions under Section 20 of the Act with which the Court should really hasten to clothe the petitioner. The Court denies the petitioner every vestige of hope they grant. In so doing that broad and sympathetic purpose of the Act is defeated. It is remarkably strange that the New York decisions so generously cited in support of limitations that nowhere is the judicial suggestion made that to have the benefit of a Statute of Limitations it must be pleaded. Otherwise it affords no legal bar to recovery and under no circumstances does it destroy any right.

Conclusion.

Conscious of the limitations this Court has established in the issuances of writs of certiorari; conscious of the devastating effect to petitioner of the judgment of the Court of Appeals in its cold opinion patent with error and with a full and humble appreciation of the ultimate justice to which

petitioner is entitled and the power of this Court to rescue and preserve his rights, counsel witnessing this continuing injury to petitioner, fervently appeals to the magnanimous discretion of this Court to require the Court below to certify its proceedings here for review and that in the ends of common and every-day justice the judgment below be reversed and the Supreme Court of the District of Columbia be directed to issue the mandatory injunction as prayed in the original petition filed therein. Without such a review and direction all hope is abandoned.

Respectfully submitted,

HARLAN WOOD,
Counsel for Petitioner.

JAMES P. DONOVAN,
Of Counsel.

WHEREFORE, your petitioner prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the District of Columbia, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Court in the case entitled "Isaac Chapman, Appellant, v. Robert J. Hoage, et al., Appellees," to the end that said cause may be reviewed and determined by this Court in the manner provided by law; and your petitioner prays that the judgment of the United States Court of Appeals for the District of Columbia be reversed.

ISAAC CHAPMAN,
By HARLAN WOOD,
Counsel for Petitioner.

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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 151

ISAAC CHAPMAN,

Petitioner,

vs.

R. J. HOAGE ET AL.,

Respondents.

PETITIONER'S REPLY BRIEF.

HARLAN WOOD,
JAMES P. DONOVAN,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 151

ISAAC CHAPMAN,

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Respondents.

PETITIONER'S REPLY BRIEF.

Counsel did not have before him at the time the Petition and Supporting Authorities were prepared the printed Transcript of the Record, and for that reason it may be helpful to the Court to have a chronological resumé of the case stated herein without any interpolation or deduction on the part of counsel.

(1) Petitioner was injured December 15, 1928 (R. 2). (Injuries to head, crushed right foot and nervous system; R. 24).

(2) Notice of Election filed June 10, 1929 (R. 2), under Section 33 of Act (R. 76) approved March 4, 1927, 44 Stat. 1424, as amended by Act approved May 17, 1928, 45 Stat. 600 (R. 74).

(3) Suit filed #76949 against Washington Railway and Electric Company, July 18, 1929, and damages ($3,000.00) recovered (R. 2).

(4) Judgment reversed May 8, 1933 (62 App. D. C. 140; 65 F. (2d) 486) and certiorari (316) denied October 9, 1933 (R. 5).

(5) Application for hearing before Employees' Compensation Commission renewed under election, March 1, 1934 (R. 3).

(6) Hearing was set for April 26, 1934, and continued indefinitely by the Deputy Commissioner (R. 2, 3).

(7) Application filed to proceed *in forma pauperis* and denied May 3, 1934 (R. 3, 7).

(8) Cause discontinued by præcipe May 9, 1934 (R. 3).

(9) Hearing resumed before Deputy Commissioner June 8, 1934 (R. 3, 17), and testimony taken.

(10) Compensation order filed by Deputy Commissioner June 27, 1935 (R. 10).

> "1. That the claimant, having filed his election to pursue his remedy against the third party and having failed to pursue his remedy to completion, has prejudiced the rights of the employer herein by allowing the statutory limit to run against any rights the employer might have had and the claimant therefore is not entitled to compensation within the meaning of the Act."

(11) On July 11, 1934, Petition for Mandatory Injunction to review the award was filed (R. 1) under Section 21, par. G, Act p. 14.

(12) Intervention of Indemnity Insurance Company of North America (R. 68), August 6, 1934.

(13) Motion to dismiss filed July 27, 1934 (R. 67), and September 7, 1934 (R. 69), on grounds "in accordance in

law" and "rights of intervenor were prejudiced by the running of the Statute of Limitations."

(14) Final Decree November 19, 1934 (R. 70).

(15) Appeal noted December 4, 1934 (R. 71), argued in Court of Appeals April 9, 1935 (R. 74); decided May 13, 1935 (R. 74); majority opinion (R. 74, etc.); minority opinion (R. 78, etc.).

Reply Argument and Authorities.

Counsel do not question that the findings of fact of the Deputy Commissioner supported by evidence are conclusive and not subject to be disturbed by the courts. By this same token, the absence of any evidence or facts to support a conclusion may be the subject of judicial inquiry and reference to the evidence. *Cohen* v. *Petty*, 62 App. D. C. 189, 190, 65 F. (2d) 822; *Indemnity Insurance Company of North America* v. *Hoage et al.*, 61 App. D. C. 173, 58 F. (2d) 1074. Therefore, in such matters as are subject to a conclusion of fact on the part of the Deputy Commissioner, his inquiry into the facts based upon substantial evidence may not be reviewed. The distinction is that "jurisdictional facts" may be reviewed.

The respondent has treated with indifference the proposition of law involving the right of subrogation and the necessity for the pleading of limitations as a defense. Subrogation does not involve a fantasy; it is more than a fiction; it is not a mere hope; it is a reality.

In this reply it will be as was the purpose of the petitioner in his petition to cast some light upon the subject matter involved in this litigation in order that a true and just construction of the Federal Statute may be had. The construction placed by the several States, as appears in the opinions from those States referred to in respondent's brief, leaves us still in pitch darkness.

A cursory and hurried reading of the Industrial and Compensation Acts cited in respondent's brief shows that they vary from one another and all differ from the Federal Statute now under consideration in the provisions and language used with respect to elections and "third party" actions.

To ilustrate, the Delaware Statute provides that the injured employee has the right of election, "but he shall not proceed against both," referring to a claim for compensation and a suit against a third party.

The Indiana Statute gives the employee a right of action against a "third party" but provides, and rightfully so, that collection may not be had from both the employer and a third party. The Massachusetts, Michigan, and Maryland Statutes are similar to the Delaware Statute. Without burdening the Court further with a differentiation between these varying Statutes of the several States, suffice it to say that none of them contain the permissive provisions of the Federal Statute, and the election must be made either prior to the filing of a claim for compensation or when made it becomes by the terms of such a Statute "final."

Great stress is laid upon quotations from the decisions of the Courts of New York. Suffice it to say that the provision of the Statute is dissimilar to the one now under consideration. Section 29 of the Compensation Laws of New York, among other things, provides, referring to an employee:

> "Shall, before any suit or any award under this chapter, elect whether to take compensation under this chapter or to pursue his remedy against such other."

Any construction of that Statute to make it similar to the one before the Court would of necessity be a strained

one. The provision of the New York Statute is *mandatory* or at least *directory* and the provision of the Federal Statute is *permissive*. To place a construction on the Federal Statute similar to the construction placed upon the Statute for the State of New York, this Court would have to disregard the permissive phases of section 33 of the Act under consideration and would have to entirely disregard paragraph f of section 33 of the Act, which makes a provision for a set-off in favor of the employer and a deficiency claim for the employee. It would further require the Court to read into the Act appropriate language requiring that when suit is instituted against a third party under the Federal Act, such suit must be reduced to a "judgment." The only penalty attached to any election under the Federal Statute is found in paragraph g of section 33 of the Act, which relates to a "compromise without the written approval of the employer."

Section 20 of the Act incorporates favorable presumptions for the injured employe which it is contended requires that the employer and his insurance carrier should affirmatively show not as a conclusion on the part of counsel, nor a conjecture on the part of the Deputy Commissioner, nor the Court that the right of subrogation involved something of substance rather than a mere legal formality or formal judgment of record. It may be pertinently asked, In what stronger position would the respondent have been had a retrial occurred in the Supreme Court of the District of Columbia with the evident necessity for a directed verdict against the petitioner and formal judgment issued thereon? What benefit would the latter action have conferred upon the respondent? It would have prolonged a barren controversy.

Conclusion.

Counsel for the respondent takes petitioner's counsel to task for a lack of industry in vigorously prosecuting his third party action and lack of good faith in the prosecution of the case and complains that it has been deprived of a right because the case was not tried by the respondent "with its own counsel in its own way." Respondent's brief 10, 29. No offense is taken at this observation on the part of respondent's counsel, who now appears in the case for the first time, although he is aware, as appears from his brief, that this Court on October 9, 1933, in Petition 316 (290 U. S. 661) denied this petitioner certiorari in his third party action, affirming in effect the judgment of the Court of Appeals, 62 App. D. C. 140, which held your petitioner guilty of contributory negligence as a matter of law, estopping him forever as a matter of fact from asserting any substantial claim against the third party, and by the same token exploding the theoretical claim of a "prejudiced right" of the respondent.

It is respectfully submitted that a proper and true construction of the Statute now under consideration to require that the Deputy Commissioner be directed by an appropriate order of the Supreme Court of the District of Columbia to make an award of compensation to the petitioner.

Respectfully submitted,

HARLAN WOOD,
J. P. DONOVAN,
Attorneys for Petitioner.

Service of copy of above acknowledged this 21st day of November, 1935.

FRANK H. MYERS,
Attorney for Respondent.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 151

ISAAC CHAPMAN,

Petitioner,

vs.

ROBERT J. HOAGE, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Respondents.

BRIEF FOR RESPONDENT, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 151

ISAAC CHAPMAN,

Petitioner,

vs.

ROBERT J. HOAGE, DEPUTY COMMISSIONER, UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, AND INDEMNITY INSURANCE COMPANY OF NORTH AMERICA,

Respondents.

BRIEF FOR RESPONDENT, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA.

Short Statement.

This case arises under Sections 21 and 33, hereinafter quoted, of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat. 1424), made applicable to the District of Columbia by the Act of May 17, 1928 (45 Stat. 600).

The Deputy Commissioner, R. J. Hoage, after hearing the evidence and finding the facts, rejected petitioner em-

ployee's claim for compensation (R. 9-10) and his decision was sustained by the Supreme Court of the District of Columbia (R. 70) and by the United States Court of Appeals for the District of Columbia (R. 74-78), under circumstances which may be briefly stated, in chronological sequence, as follows:

December 15, 1928—Petitioner, Isaac Chapman, hereinafter called the "employee," while working as a helper on a truck of Palais Royal, Inc., hereinafter called the "employer," was injured when the truck collided with a street car of the Washington Railway and Electric Company, in the District of Columbia (R. 2, 9). The bones of the toes of the employee's right foot were fractured (R 42), the principal injury being to the bone of the "big toe" (R. 40), which healed satisfactorily (R. 67).

June 10, 1929—The employee gave written notice to the Deputy Commissioner that he elected to sue the third party, the Railway Company, for damages and, if the compensation to which he was entitled under the Compensation Act exceeded the amount recovered from the third party, he made claim to the difference, as provided by the Act (R. 2, 9).

July 18, 1929—The employee filed suit in the Supreme Court of the District of Columbia against the Railway Company and thereafter obtained a verdict in his favor for $3,000, but on May 8, 1933, the judgment thereon was reversed by the United States Court of Appeals for the District of Columbia, and the cause was remanded to the lower Court "for further proceedings" (62 App. D. C. 140, 65 F. (2d) 496). Application to this Court for writ of certiorari was denied on October 9, 1933 (290 U. S. 661).

March 1, 1934—Without attempting any further proceedings in court against the third party, the employee ap-

plied to the Deputy Commissioner for compensation (R. 2, 5, 9-10).

April 26, 1934—At a hearing on the application before the Deputy Commissioner, counsel for the Indemnity Insurance Company, hereinafter called the "insurance carrier," which insured the compensation liability of the employer, immediately protested that the Commissioner was without jurisdiction because "the claimant has not pursued and exhausted his third-party remedy"; that the case had been remanded for a further trial and if the employee "does not pursue his third party remedy to its completion, he irrevocably prejudices the rights of the employer to a subrogation of the action," because the statute of limitations "precludes us from pursuing our rights" (R. 14). After counsel for the insurance carrier further elaborated his position, counsel for the employee stated: "I must say that in part *I am forced to agree with you*" (R. 16). The Deputy Commissioner then continued the case indefinitely, saying: "Whenever you advise me that the case is perfectly clear of court procedure and make a request for a further hearing, I will be glad to hear it" (R. 16).

May 3, 1934—In his action against the Railway Company the employee then filed a motion for leave to proceed further therein, without payment of costs, stating that under the decision of the Court of Appeals he "would be stopped from obtaining a judgment in his favor in any future proceedings," but that upon applying for compensation, the Deputy Commissioner held that he had not exhausted his remedy at law and he prayed permission to proceed in court "for the purpose of having this cause determined as a matter of record" (R. 7-8).

May 9, 1934—The above motion was denied by the court "and plaintiff (employee) thereupon, through his attorneys

of record, *by præcipe duly filed in said cause, discontinued said action''* against the Railway Company (R. 70).

June 8, 1934—At a further hearing before the Deputy Commissioner, counsel for the insurance carrier renewed his objection that the employee had not exhausted his remedy against the third party and, the statute of limitations having intervened, the employer's subrogation rights had been prejudiced, especially as the suit against the third party had not been dismissed by the court, but by the voluntary action of the employee's attorneys (R. 20-21). The Deputy Commissioner then received testimony as to the extent of the injuries, principally a fracture of the bone of the ''big toe'' on the right foot (R. 40), which healed (R. 67). The employee ~~received~~ earned $18 per week at the time of the injury (R. 19) and $20 per week at the time of the compensation hearing (R. 18).

June 27, 1934—The Deputy Commissioner filed his findings of fact and rejected the claim for compensation, saying:

> ''It is found that the claimant by his action in not pursuing his remedy against the third party to its completion within the statutory limit has thereby prejudiced the rights of and precluded the employer from taking such action as is provided in the compensation law'' (R. 9-10).

July 11, 1934—Under Section 21 of the Compensation Law, providing that ''if not in accordance *with law*, a compensation order may be suspended or set aside'' through injunction proceedings, mandatory or otherwise, Chapman filed this bill in equity in the Supreme Court of the District of Columbia, to set aside the above compensation order and to require the Deputy Commissioner to award compensation (R. 1-4).

July 27, 1934—Deputy Commissioner filed a motion to dismiss the bill (R. 67-68).

August 6, 1934—Insurance carrier obtained leave to intervene and on September 7, 1934, filed a motion to dismiss bill (R. 68-69).

November 19, 1934—Final decree of Supreme Court of the District of Columbia dismissing bill (R. 70).

May 13, 1935—Opinion rendered by United States Court of Appeals for the District of Columbia, affirming above decree and holding:

> "The election of plaintiff to bring suit against the third party, and his failure to pursue that remedy to final judgment, with the intervention of limitations, bars his right to recover compensation under the statute." (R. 74-78.)

Statute Involved.

Section 33 of the Compensation Act of March 4, 1927 (44 Stat. 1424), made applicable to the District of Columbia by the Act of May 17, 1928 (45 Stat. 600), provides:

> "Compensation for Injuries Where Third Persons Are Liable.
>
> Sec. 33 (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, *he may elect*, by giving notice to the deputy commissioner in such manner as the commission may provide, *to receive such compensation or to recover damages against such third person.*
>
> (b) Acceptance of such compensation *shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person*, whether or not the person

entitled to compensation has notified the deputy commissioner of his election.

(c) * * * (not involved).

(d) *Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.*

(e) Any amount received by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under section 7.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative *elects to recover damages against such third person* and notifies the commission of his election and *institutes proceedings* within the period prescribed in section 13 (one year), the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the commission deter-

mines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (e) *only if such compromise is made with his written approval.*

(h) (Not involved)."

(Italics supplied.)

Section 21 of the same Compensation Act, provides:

"Review of Compensation Orders.

Sec. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District)."

Section 35 of the Compensation Act provides for the substitution of the insurance carrier for the employer.

Question Involved.

Were the two lower courts right in holding that the Deputy Commissioner's order of June 27, 1934 (R. 9-10), was "in accordance with law," under Sections 21 and 33

of above Compensation Act, such order having *rejected* the employee's claim for compensation because the employee, after electing to sue and after suing the third party for damages, *voluntarily discontinued his suit*, without the consent of the employer and over the protest of the insurance carrier, *after* the statute of limitations barred the institution of a new action against the third party, thereby prejudicing the employer's right of subrogation?

ARGUMENT.

1. The findings of the Deputy Commissioner, supported by evidence, are final and conclusive.

It is well settled that the findings of fact of the Deputy Commissioner, when supported by substantial evidence, are final and conclusive and will not be disturbed by the Courts.

Crowell v. *Benson*, 285 U. S. 22;
Voehl v. *Indemnity Ins. Co.*, 288 U. S. 162.

In the present case, every fact found by the Deputy Commissioner in his compensation order rejecting the claim (R. 9-10) was fully supported by ample evidence, which has not been and can not be controverted, as shown by the foregoing statement, with references to the record. The Deputy Commissioner thereupon made a definite finding that the employer's right of subrogation had been prejudiced by the employee's action in first electing to sue the third party and then dismissing his action without the consent of the employer after the statute of limitations intervened.

In the *Voehl* case, 288 U. S. 162, this same insurance carrier contended that the Deputy Commissioner's findings with respect to "jurisdictional facts," or facts which constituted a conclusion from other proved facts, were not final and could be reviewed, reversed or modified by the courts, but this Court overruled that contention.

Therefore, the Deputy Commissioner's definite finding in the present case that the employee's action, in voluntarily dismissing his suit against the third party, *prejudiced* the employer's right of subrogation, is not subject to review by the courts, but must be treated as final and conclusive.

The employee's voluntary dismissal of his action against the third party constituted a compromise and under paragraph (g), Section 33 of the Act, the employer was liable for compensation "only if such compromise is made with his written approval." In the present case there was no such written approval and, in fact, the insurance carrier, *before* the third party's action was discontinued, protested and notified the employee that the third party remedy should be pursued to a final decision (R. 14-15).

As matter of law, therefore, the Deputy Commissioner was right in rejecting the claim for compensation because the employee violated the provisions of the Compensation Act and prejudiced the employer's rights.

2. At the outset, employee's election to sue third party deprived employer of a substantial right of subrogation.

The Compensation Law contemplates that industry shall bear the burden of the cost of injuries sustained by employees in the course of their employment. On the other hand, the statute recognizes the principle that the real wrongdoer shall pay the penalty for his negligence in causing injury and provides that, when an employee is injured through the negligence of a third party, the employee may elect to sue the third party or accept compensation from his employer. If the employee elects to accept compensation, the statute gives the right of subrogation to the employer who may then sue the wrongdoer.

Counsel for employee earnestly claim that a reading of the opinion of the United States Court of Appeals for the

District of Columbia in the employee's action against the third party (62 App. D. C. 140) (which forms no part of the record in the present case), will show that the employer's right of subrogation against the third party was valueless and therefore not a "substantial right."

The damage to the employer's right of subrogation, however, was done long before the Court of Appeals rendered its decision. Under paragraph (b) of Section 33 of the Compensation Act, the employee's acceptance of compensation *automatically operated as an assignment* to the employer of the employee's cause of action against the third party. If the employee had elected to accept compensation the employer would have been entitled *then* to engage its own counsel, to make its own exhaustive investigation of the facts, to secure the attendance of all favorable witnesses and to prosecute the case against the third party, as vigorously as possible, to a conclusion.

When the employee, at the outset, on June 10, 1929, filed a written notice of his election to pursue the remedy against the third party, *then* he deprived the employer and insurance carrier of the valuable and substantial right of subrogation. After making the election to sue the third party, if the employee pursued his remedy in a half-hearted way, he did so at his own risk. If the employee failed to secure the attendance of witnesses who might have helped to prove that the third party was negligent, the employee, not the employer, should suffer the penalty for his neglect.

That the employee did not prosecute his case vigorously to a conclusion is illustrated by the motion which he made to proceed in the third party action without payment of costs, such motion not having been made until the insurance carrier insisted at the hearing on April 26, 1934, that he should exhaust his remedy against the third party (R. 14-15). In this motion the employee stated to the court that, under the decision of the Court of Appeals, he "would be

stopped from obtaining a judgment in his favor," but, in order to be in a position to obtain compensation, he filed the motion "for the purpose of having this cause determined as a matter of record" (R. 7-8). It is apparent that this was not a *bone fide* effort to prosecute his case to a conclusion, but a half-hearted gesture to comply with the letter but not the spirit of the compensation law.

The court very properly refused to be a party to any such scheme and denied the motion. Then the employee, without the consent of his employer and after the employer had been deprived of the right to protect itself, a suit by the employer being then barred by the statute of limitations, voluntarily caused the third party action to be discontinued (R. 70).

3. The voluntary discontinuance by the employee of his action against the third party does not afford a basis for determining the amount of the insurance carrier's liability for deficiency compensation.

After electing to proceed against the third party, the employee became entitled, under paragraph (f), Section 33, of the Act, to an award for any deficiency between the amount recovered from the third party and full compensation due under the Act.

Having elected to sue, the employee left it to the courts to determine the amount to be recovered from the third party. After filing suit, the employee was given no right to decide for himself that his recovery should be zero and, by voluntarily dismissing his suit, demand full compensation, the employer's right of subrogation having been destroyed in the meantime by the statute of limitations.

Paragraph (g), Section 33, distinctly provides that the employee may not compromise his case against the third party without the written approval of the employer, the statute thus recognizing the employer's right to have the

case against the wrongdoer prosecuted to a conclusion, either by the employee in his own right or by the employer under the right of subrogation given by paragraph (b) of Section 33.

The employee could not circumvent the statute by dismissing his suit and thus furnish a basis for computing the deficiency for which the employer or insurance carrier would be liable. Such dismissal constituted, in effect, a compromise which he was not permitted to make without his employer's written approval, which he did not obtain, after being notified that the insurance carrier insisted upon his going forward with "further proceedings" in the case against the third party.

Counsel for the employee contend, and the learned Justice who wrote the dissenting opinion in the Court of Appeals suggested, that such "further proceedings" would have been "bootless" or futile. Under the decision of this Court, however, in the case of *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, after the plaintiff obtained a verdict in his favor, as the employee did in the present case, neither the trial court nor the appellate court had power to enter a judgment in favor of the defendant, but under the Seventh Amendment to the Constitution, the employee plaintiff had an absolute right to a new trial, on the issues of fact, before a jury. At such new trial, evidence not offered at the first trial might have been introduced to prove that the Street Railway Company was negligent after seeing Chapman in a position of peril on the track, even though Chapman may have been negligent in the first instance.

When Chapman elected to sue the third party, he must have decided that he had a good cause of action, and, thereafter, the Compensation Act gave him no right to change his mind and decide for himself that he did not have a good cause of action. Chapman had no right to take the law into

his own hands and make a decision, which the courts could not make without the aid of a jury. This is exactly what Chapman undertook to do, when *he* decided that he could not recover from the Railway Company and, therefore, voluntarily dismissed his suit against the Railway Company. By such act he deprived the employer and insurance carrier of a valuable right of subrogation and forestalled any chance which they might have had to recover from the Railway Company and have the amount of such recovery credited on the compensation payable to Chapman. The amount of such recovery, as Chapman no doubt hoped when he elected to sue the third party, might have exceeded the compensation payable under the Act, in which event the employer and insurance carrier would have been under no obligation to make any payment whatever.

4. **Having made an election to sue the third party, the employee was estopped from claiming compensation until after his action against the third party had been finally determined.**

As above shown, either a determination by a court and jury of the amount recoverable from the third party, or a compromise with the written approval of the employer, was necessary, as a condition precedent, to fix the basis for a computation of the deficiency compensation, if any, due the employee.

After electing to sue the third party, the employee, by his voluntary conduct in dismissing the action, prevented a final determination of the liability of the wrongdoer and made it impossible to effect a favorable compromise. The election thus made by the employee and his voluntary conduct in dismissing his suit, having prejudiced the employer's right of subrogation, the employee is *estopped* from claiming compensation from the employer, or its insurance carrier.

In *Dahn* v. *Davis,* 258 U. S. 421, a railway mail postal clerk, who was injured in a railroad wreck, had an option to accept compensation from the Government under the Federal Employees' Compensation Act (39 Stat. 742), or sue the Government, through the Director General of Railroads, under the Federal Control Act (40 Stat. 451), for damages resulting from the negligent operation of the train. This Court held that the employee, having *elected* to accept compensation, was barred from prosecuting an action for negligence against the Director General of Railroads.

It is elementary law that where a party has two remedies, he must elect to pursue one or the other. If, while pursuing one remedy, the other remedy becomes barred by the statute of limitations, he loses the right to pursue the alternative remedy.

Willard v. *Wood,* 164 U. S. 502.

Authorities.

A. Petitioner's counsel have cited only two cases in support of their main contention and both of them may be distinguished from the case at bar.

During the past thirty years Workmen's Compensation Laws have been enacted in nearly all of the States of the Union and also by Congress, covering injuries to Federal employees, longshoremen and harbor workers and employees in Alaska, Hawaii, Philippines, Porto Rico and the District of Columbia, and there have been many decisions construing these laws, many of which provide for an election by the employee to accept compensation or sue the third party causing his injury. A digest of such laws will be found in Bulletins Nos. 423, December, 1926, and 485, November, 1929, Bureau of Labor Statistics, Department of Labor.

Notwithstanding many decisions on the subject, counsel for petitioner, although citing several cases relating to general principles, have mentioned, in their brief, only two decisions in support of their main contention, namely, *Van Deusen* v. *Hoage,* not reported, in the Supreme Court of the District of Columbia, and *American Lumbermen's Mutual Casualty Co.* v. *Lowe,* 70 F. (2d) 616, both of which may be distinguished from the case at bar.

In *Van Deusen* v. *Hoage,* Equity No. 56,030, Supreme Court D. C., not reported, an injured employee elected to sue a third party, but later decided not to do so, because in a suit brought by his wife, who was injured in the same accident, it was discovered that the third party was judgment-proof. The injured employee then claimed compensation, well *within the statutory period of three years,* but the insurance carrier contended that its right of subrogation had been prejudiced because the third party had left the District of Columbia. Judge Adkins filed an opinion in the case to the effect that no substantial right of subrogation had been prejudiced and the employee was entitled to compensation. The difference in the facts is apparent. Furthermore, with due deference to Judge Adkins, it is respectfully submitted that he erred in undertaking to determine, upon the record before him, that the employer's right of subrogation was not "substantial." That could only be determined in an action prosecuted by the employee against the third party to a final conclusion.

The only other case, upon which petitioner's counsel relies in support of his main contention is that of *American Lumbermen's Mutual Casualty Co.* v. *Lowe,* 70 F. (2d) 616, which arose under the Longshoremen's Act. There the widow of an employee, who was killed, was told by an insurance carrier that she could elect to sue the Steamship Company and later, if she chose to do so, she could dis-

continue such action and compensation would be paid to her. The accident occurred on October 13, 1932, and the widow elected on December 7, 1932, to sue the third party, but due to her financial necessities, on April 6, 1933, only a few months after the accident, she notified the compensation commissioner and insurance carrier that she intended to discontinue her action and claim compensation. The insurance carrier was represented at the motion to discontinue the third party action and merely stated that it did not consent to the discontinuance. The commissioner awarded compensation and suit was filed to set aside the award.

The Circuit Court of Appeals for the Second Circuit held that

> "*in the absence of such delay as will prevent the employer or its carrier from effectively availing themselves of their rights against the third person by way of subrogation,* would there seem to be adequate reason for depriving a person entitled to compensation of the right to discontinue her action and seek compensation under the statute.
>
> • • • • • • •
>
> In our opinion some prejudice to the employer or the carrier from the discontinuance of the action ought to be shown in order to render the initial election unalterable. Here there was none. When the action was discontinued, *the statute of limitations had long to run,* so that the employer, as soon as the widow determined to proceed under the Compensation Act, became subrogated to her rights against the Royal Netherlands Steamship Company by reason of section 33 (b) of that Act, and *had plenty of time to bring the action.*" (Italics supplied.)

The court further held that there was no final election by the widow because she had been misled by the insur-

ance carrier, which had told her that if she would sue the third party she could discontinue that action later and obtain compensation.

Thus, in the *Lowe* case, the court laid much stress on the fact that the employer's right of subrogation had not been prejudiced because the third party action was discontinued only a few months after the accident and the statute of limitations had not intervened to bar action by the employer against the third party. In the present case, the injury occurred on December 15, 1928, and the third party action was discontinued, over the insurance carrier's protest, about *five years and five months'* later, May 9, 1934, after the three-year statute of limitations, of which the courts take judicial notice, barred action by the employer against the third party under the automatic assignment in paragraph (b), Section 33, of the Compensation Act.

B. Many Cases Support Position of Insurance Carrier.

State Statutes.

The following workmen's compensation statutes have been construed to mean that an injured employee may elect to claim compensation under the act or sue the third party for damages, but, where an election has been made to pursue one of the two alternative remedies, thereafter the employee is absolutely barred from pursuing the other remedy, until the remedy first selected has been exhausted.

Delaware, Sec. 131 of Compensation Act, Chapter 233, Vol. 29, Laws of Delaware;

Indiana, Sec. 13 of Compensation Act, Acts of 1915, p. 392, Sec. 80201, Burns' Supp. 1918;

Maryland, Sec. 58, Article 101, Maryland, modified by Chapter 456, Acts of 1920, so as to give employee right to sue third party, if employer fails to do so within two months of award of compensation;

Massachusetts, Sec. 15, Chapter 152 of General Laws;
Michigan, Sec. 15, Part 3, of Michigan Workmen's Compensation Law, (Sec. 5468, 2 Comp. Laws, 1915);
New York, Sec. 29, New York Compensation Law;
Oklahoma, Sec. 7302, Comp. Stat. 1921;
Texas, Art. 8307, Sec. 6a, Revised Statutes of 1925;
Utah, Sec. 3133, Compiled Laws of Utah of 1917, amended by Chap. 67, Laws of 1921;
Wisconsin, Sec. 2394-25, Stats. 1921; Sec. 102.29 (2), Stats. 1927;
England, Section 6 of English Compensation Act of 1906 (6 Edw. 7, c. 58).

The effect of an employee's election to sue the third party for damages as a bar to a subsequent claim for compensation from the employer, is illustrated by many cases in many different jurisdictions.

State Decisions.

New York.

Section 29 of the New York Compensation Law is quite similar to Section 33 of the Longshoremen's Act above quoted, in that an award of compensation constitutes an assignment of the employee's cause of action to the person liable for the payment of the award, and, if election is made by the employee to sue the third party, the employee is entitled only to the deficiency between the recovery and the compensation payable under the Act. A compromise may be effected only with the consent of the party liable for the payment of compensation.

In the present case, the majority opinion of the United States Court of Appeals calls attention to the fact that while Section 33 of the Longshoremen's Act provides that the employee *may* elect to sue the third party, Section 29

of the New York Law provides that the employee *shall* elect either to take compensation or sue the third party. The Court of Appeals then stated in its opinion that the provision in the New York law compelling election furnishes "a remote basis for the extreme holding of the New York courts in interpreting their act," but, it is respectfully submitted that while the Longshoremen's Act provides that the employee "*may*" elect, he is in effect compelled to do so, as the acceptance of compensation constitutes an automatic assignment to his employer of his action against the third party, and, after the election has been made, as in the present case, whether he made the election voluntarily or by compulsion seems to be immaterial.

Construing Section 29 of the New York Compensation Act, the courts of that State have held repeatedly that, after an injured employee has elected to sue the third party, he can not compromise or discontinue such action without the consent of the employer. If he does so, he is not entitled to compensation.

In *McKee* v. *White*, 218 N. Y. S. 215, 218 App. Div. 300 (1926), claimant was injured on September 18, 1922; elected to sue the third party, but the third party action was dismissed on May 14, 1925, for want of prosecution, after the statute of limitations barred institution of a new suit. In an unanimous opinion, reversing an award of compensation, the Appellate Division said:

> "By reason of claimant's election to sue the third party and failure to prosecute the action he brought, the carrier has been deprived of a substantial right, which but for the election it would have had, namely, its right of subrogation to claimant's remedy against the third party.
>
> * * * * * * *
>
> "We think the appellant's rights have been sacrificed and that the claimant is estopped from asserting a claim for compensation against them."

This opinion was unanimously affirmed by the Court of Appeals of New York, **Chief Justice Cardozo** concurring (244 N. Y. 610).

In *O'Brien* v. *Knickerbocker Ice Co.,* 211 N. Y. S. 15, 213 App. Div. 464, affirmed in *O'Brien* v. *Lodi,* 246 N. Y. 46 (1927), an employee elected to sue the third party, then compromised and discontinued his third party action, without notice to or consent of his employer, and the New York Court of Appeals held:

> "If he settles, as he has a right to do, his cause of action with the third party without the consent of the insurer, he loses his right to the deficiency. This provision of section 29 is to protect the insurer as to the amount of the deficiency; it has no other purpose.
>
> * * * * * * *
>
> "Therefore, when the claimant in this case settled his action with the defendant (third party) for $300 without the written approval of the Commissioner or the insurer, *he released his right to the deficiency.*"

Chief Justice Cardozo concurred in above opinion. In the case at bar, the discontinuance of the action against the third party amounted to a *compromise*, without the consent of the employer and over the protest of the insurer. Under paragraph (g) of Section 33, therefore, Chapman lost his right to compensation.

In *Kavanaugh* v. *Belden,* 231 App. Div. 412 (1931), an employee was killed on September 8, 1924, by a train and his widow first claimed compensation, then elected to sue, but at the compensation hearing on May 29, 1929, it was found that no summons had ever been served upon the third party and the statutory period for bringing an action had expired. In holding unanimously that the widow was not entitled to compensation, the Court said:

> "Having made election to sue, it was claimant's duty to go on with the action. By her failure to prosecute,

> the carrier has been deprived of a substantial right, which it would have had, but for the election, namely, its right of subrogation to claimant's remedy against the third party."

In *Breital* v. *Hinderstein*, 236 App. Div. 203; 258 N. Y. S. 237 (1932), an infant employee was injured on October 10, 1927, and his time to sue the third party expired on March 13, 1931, one year after he became 21. On October 26, 1927, claimant filed an election to sue the third party, but his attorneys did not bring the case on for trial because claimant did not furnish disbursement money and the third party action was discontinued by stipulation. The Compensation Board awarded compensation on the theory that the discontinuance of the third party action had not prejudiced the employer's right of subrogation, because the statutory time within which suit could be filed against the third party had not expired. The Appellate Division of the Supreme Court, however, held:

> "The theory of the Board is untenable. The confusion arises from the failure to differentiate between an election to take compensation and an election to sue a third party. The claimant cannot elect compensation and also elect to sue a third party. When an election has been made, it is final. *Travelers Ins. Co.* v. *Brass Goods Mfg. Co.*, 239 N. Y. 273, 146 N. E. 377, 37 A. L. R. 826. If the election is to take compensation, an award operates to subrogate the carrier to the claimant's cause of action, if any exists, against the third party. In *O'Brien* v. *Lodi*, 246 N. Y. 46, 157 N. E. 925, it has also been definitely settled that *if an election is made to sue a third party, the sole relief in compensation is an award for deficiency* and there is no assignment of the cause of action to the carrier. *The theory is that the cause of action has been exhausted in order to determine the amount of the deficiency.* If there is no judgment on the merits fixing

the deficiency, there can be no award for deficiency. So unless the carrier has waived its rights in some way, *the consent of the carrier was essential to a discontinuance of the action.*

* * * * * * *

"The question is raised whether a discontinuance is in effect a compromise. I think that *any act whereby the election to sue is not carried to judgment on the merits in order to fix the deficiency is preventive of any award for deficiency unless the carrier has consented or has waived its right in some way.* In this case the carrier did not consent nor did it estop itself to raise a question of prejudice. It was prejudiced and its counsel raised the question at the earliest opportunity. * * *" (Italics ours.)

In the most recent case in New York of *Burmester* v. *DeLucia,* 237 App. Div. 149, 261 N. Y. S. 203 (1932), the accident happened April 13, 1927, and the time expired for suit against the third party on April 13, 1930. Claim for compensation was made April 14, 1927, and, notice of election to sue the third party was thereafter filed on July 28, 1927. By stipulation dated May 10, 1930, the attorneys for defendants (a co-partnership of which the employer was one member) agreed that the third party action be discontinued. The employee made an affidavit attached to the stipulation in which he stated that he had consulted his attorney regarding the liability of the defendants and after due deliberation *had concluded that the case was one of doubtful liability and financial responsibility.* An order was thereafter granted upon this stipulation discontinuing the suit on October 20, 1930, and the employee renewed his claim for compensation. The insurer defended on the ground that the accident did not occur in the course of employment and an award was made. The insurer made a compensation payment under the award but subsequently

repudiated it on the ground that the employee was estopped from claiming compensation due to the discontinuance of the third party suit without its written consent. In reversing the award, the Appellate Division said:

> "The sole question raised on this appeal is that claimant is estopped from asserting any claim for compensation, the argument being that the conduct of the claimant has deprived appellants of their right of subrogation to their prejudice.
>
> "* * * *It appears that the third party action was not discontinued until after the statute of limitations had run against the third party.* * * * By Section 29 of the Workmen's Compensation Law, the *carrier being liable only for deficiency* where a third party action is brought, *the amount of such deficiency could only be determined after the conclusion of the third party action.* No award could be made prior thereto. The carrier was then assured that the action had been discontinued. Upon investigation it discovered that this was not the fact. It then objected that the period of limitation had expired and thereby its rights had been prejudiced. This objection is valid. By the conduct of the claimant he is estopped from asserting liability against such carrier." (Italics ours.)

The Appellate Court of New York reversed this decision (*Burmester* v. *DeLucia*, 263 N. Y. 318 (1934)), on the ground that the carrier, with full knowledge of the defense on which it later sought to rely, had elected at the compensation hearing to interpose an entirely different defense and, having failed on that ground, to then avail itself of the defense which it knew about, but failed to urge, at the hearing. It did not reverse or change the rule followed in the portion of the opinion above quoted.

Massachusetts.

Under Section 15, Chapter 152, General Laws of Massachusetts, an injured "employee may at his option proceed either at law against that person (third party) to recover damages, or against the insurer for compensation under this chapter, but not against both."

In the case of *Coughlin* v. *Royal Indemnity Co.*, 244 Mass. 317, the insurer orally promised an injured employee's attorney that if the injured would not file a claim for compensation, but sue the third party, in the event the employee lost, the insurer would still pay compensation. The employee then sued the third party and the jury returned a verdict for the defendant. The employee then claimed compensation, but the court held, even in this extreme case, that his claim for compensation was barred by his having sued the third party, saying:

> "The employee could not, under the statute, proceed against the wrongdoer and at the same time reserve his rights under the act. He was required to elect which course he would pursue, and by proceeding against the Aberthaw Construction Company, the plaintiff lost his rights under the act against the insurer."

Citing:

Cripps Case, 216 Mass. 586;
Barry v. *Bay State Railway,* 222 Mass. 366;
Labuff v. *Worcester Street Railway,* 231 Mass. 170.

Sciacia's Case, 262 Mass. 531 (1928), appears to be exactly in point. There an employee elected to sue and did sue the third party. When the third party "moved for specifications" and filed interrogatories, the employee discontinued his action and filed a claim for compensation.

The court held that, having elected to sue the third party, the employee's claim for compensation was barred, saying:

> "The fact that the action against Adams was discontinued before proceedings under the statute were begun is not material. *The election was made when the action was brought,* and by this election the employee sought a remedy inconsistent with that given him by the statute."

In *Frish* v. *Wells,* 200 Mass. 429, the court said:

> "It is not, however, the judgment which may be obtained, but the *commencement of a suit* to enforce a co-existing inconsistent remedy in a court having jurisdiction, which constitutes the decisive act and makes the election binding."

In *Tocci's Case,* 269 Mass. 221, in an opinion by Chief Justice Rugg, it was held that where an employee elected to sue and sued a third party, he could not thereafter claim compensation, even though the third party action resulted in a judgment for defendant.

The Massachusetts statute was finally amended by an Act approved May 17, 1929, to the effect that if an employee elected to sue, but then discontinued his action, after notice to the insurer, he could thereafter claim compensation, "provided that upon payment of compensation following such discontinuance *the insurer shall not have lost its right to enforce the liability of such other person,*" but the Massachusetts legislature thus refused to permit an employee to recover compensation when he had sued the third party and had discontinued his suit *after* the employer's or insurer's right of subrogation had been destroyed by the statute of limitations.

Maryland.

Under Sections 36 and 58, Article 101, of the Maryland Code, an injured employee had an option to claim compensation or sue the third party for damages, but he could not pursue both remedies.

Hagerstown v. *Schreiner,* 135 Md. 650.

Under an amendment (Chapter 456 of the Maryland Acts of 1920) to the Compensation Law, where the employer or insurer fails to sue the third party within two months after an award of compensation, the injured employee may do so, but any damages recovered must be applied first to reimburse the employer or insurer for any compensation already paid to the employee.

State v. *Francis,* 151 Md. 147.

Michigan.

Under Section 15, Part 3, of the Michigan Workmen's Compensation Act (Section 5468, 2 Comp. Laws, 1915), the Supreme Court of Michigan has held that "an election (by an employee) to proceed either in a common law action against the third person or for compensation against the employer under the statute *wipes out the other remedy.*"

Smith v. *Port Huron Gas & Electric Co.,* 217 Mich. 519, 522.

Arizona.

Under the Arizona Workmen's Compensation Law, it has been held that where an employee has elected to sue his employer at common law, the remedy adopted becomes exclusive and he can not thereafter claim compensation.

Consolidated Arizona Smelting Co., v. *Ujack,* 15 Ariz. 382.

Utah.

Under Sec. 3133, Compiled Laws of Utah of 1917, amended by Chap. 67, Laws of 1921, an employee is required to assign, to the State insurance fund, or to the employer or insurer, his cause of action against the third party, before he becomes entitled to compensation under the statute, and the Supreme Court of Utah has held that where an employee has sued the third party without making such assignment, he is not entitled to compensation.

Robinson v. *Industrial Commission,* 72 Utah, 203.

Wisconsin.

In *Krell* v. *Industrial Commission,* 203 Wis. 635, it was held that under the Wisconsin Compensation Law, Sec. 102.29 (2), Stats. 1927, the mere *commencement of an action* by the widow of an employee, who had been killed, against the third party, "operated as a waiver by her of any claim for compensation against her husband's employer."

In *McGarvey* v. *Independent Oil Co.,* 156 Wis. 580, the Court reached a similar conclusion.

Texas.

In *Ocean Accident & Guarantee Corp.* v. *Cooper,* 294 S. W. 248 (Texas, 1927), the widow of an employee, who had been killed, sued the third party, but a general demurrer to her petition was sustained and her suit was dismissed. Then she presented claim to her husband's employer for compensation, but the Court of Civil Appeals held that her election to sue the third party barred her right to compensation, saying:

> "The right of subrogation is a valuable right, and can not be destroyed by the voluntary act of the bene-

ficiary without incurring the consequences of an estoppel. It is destroyed when the beneficiary elects to sue the third party and is defeated."

In the earlier case of *Employers Indemnity Co.* v. *Felter*, 277 S. W. 376, attention was called to the fact that the right of subrogation gave the insurer the right to have the third party's liability tried *"in its own way and through its own agents and attorneys"* and the election of the employee to sue the third party deprived the insurer of that right.

England.

Under Section 6 of the Workmen's Compensation Law of England (6 Edw. 7, c. 58), a workman may elect to sue the third party or claim compensation from his employer, but he can not recover both damages and compensation.

20 Halsbury's Laws of England, p. 196.

Where a workman presents a claim for damages against a third party and receives a payment on account thereof, he is barred from claiming compensation from his employer, even though he attempts to reserve the right to make such claim.

L. R. A., 1916-A, p. 101, citing
Page v. *Burtwell*, 2 K. B. 758;
Mulligan v. *Dick*, 41 Scot. L. R. 77;
Murray v. *North British R. Co.*, 41 Scot. L. R. 383.

Decision of the United States Court of Appeals for the District of Columbia

The majority opinion of the Court of Appeals contains an accurate review of the facts, excerpts from Section 33 of the Longshoremen's Act, distinguishes the *only re-*

ported case cited in support of petitioner's main contention, and finally concludes:

> "The present case, however, is in conflict with the exception laid down in the Lowe case, since the running of the statute of limitations intervened, while the suit for damages was pending against the railway company. The election of plaintiff to bring suit against the third party, and his failure to pursue that remedy to final judgment, *with the intervention of limitations,* bars his right to recover compensation under the statute."

The conclusion thus reached is in accord with the many decisions above cited in other jurisdictions where similar compensation laws are in force, while counsel for the petitioner, with all of his diligence and research, has cited only the one case on the main question, namely, *American Lumbermen's Co.* v. *Lowe,* 70 F. (2d) 616, and that case is really an authority in favor of the respondents, as above shown.

The learned Justice, who wrote the dissenting opinion, *does not cite a single authority* in support of his position; refers at length to the opinion in the third party action, which forms no part of the record in the present case, and reaches the erroneous conclusion that the respondent's right of subrogation has not been prejudiced, such view being directly opposed to the finding of the Deputy Commissioner, which should be binding on the courts. The learned Justice makes the mistake of attempting to determine *in this case* that an action against the third party could never have been prosecuted successfully. He overlooks the fact that the right of subrogation was prejudiced *at the outset* when the employee elected to sue the third party and deprived the employer of the right to try that action *with its own counsel in its own way.*

The dissenting Judge argues that, if the third party case should be retried now, the truck driver would not be avail-

able because of his death and the employee, therefore, could not hope to succeed. He overlooks the other side of the picture, namely, the fact that if the employee had elected to take compensation in the first place, the employer could have sued the third party promptly and the truck driver, who lived for a year or two after the accident, would have been available as a witness. The death of the truck driver furnishes an additional illustration of the manner in which the employer's subrogation right was prejudiced by the employee's election to sue the third party.

Petitioner's counsel devotes a page of his brief to an argument that the statute of limitations does not operate as a bar unless pleaded, but this Court takes judicial notice of the three-year statute applicable to the action against the third party and, by reason of the delay caused by the employee's election, the defense of the statute of limitations *became available* to the third party *tort feasor* and the employer's right of subrogation was thereby prejudiced.

Position of Deputy Commissioner Hoage.

This brief is filed by counsel for the insurance carrier, which petitioner's counsel correctly characterizes in his brief as the *real* party in interest, but petitioner may not infer therefrom that the other respondent, Deputy Commissioner Hoage, has receded in any way from the position taken in his finding of June 27, 1934 (R. 9-10). It appears to be customary, however, for the Deputy Commissioner, who is only a nominal party, to leave it to the real parties in interest to litigate their differences and secure a final determination thereof.

CONCLUSION.

The Supreme Court of the District of Columbia and the United States Court of Appeals for the District of Columbia were right in agreeing that the Deputy Commissioner's order of June 27, 1934 (R. 9-10), was "in accordance with law," under Sections 21 and 33 of the Compensation Act, such order having *rejected* the employee's claim for compensation (R. 10) because the employee, after electing to sue and after suing the third party for damages (R. 2), *voluntarily discontinued his suit* (R. 70), without the consent of the employer and over the protest of the insurance carrier (R. 14-15), *after the statute of limitations barred the institution of a new action against the third party,* the cause of action having arisen on December 15 1928, and the suit dismissed May 9, 1934, thereby prejudicing the employer's right of subrogation.

It is, therefore, respectfully submitted that the judgments of the two lower courts, sustaining the findings of the Deputy Commissioner, should be affirmed.

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SUPREME COURT OF THE UNITED STATES.

No. 151.—October Term, 1935.

Isaac Chapman, Petitioner,
vs.
R. J. Hoage, Deputy Commisioner, District of Columbia Compensation District, U. S. Employees' Compensation Commission, et al.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[January 6, 1936.]

Mr. Justice Stone delivered the opinion of the Court.

This case comes here on certiorari, — U. S. —, to resolve a question arising under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424, made applicable to the District of Columbia by the Act of April 17, 1928, 45 Stat. 600.

Petitioner sought, in the Supreme Court of the District of Columbia, a mandatory injunction directing respondent, a Deputy Commissioner of the District of Columbia Compensation District, to award him compensation. In the proceedings in that court it appeared that petitioner had been injured in a collision with a street car, in the course of his employment as helper on a delivery truck of his employer, for whom the respondent, The Indemnity Insurance Company of North America, intervenor in the suit, is the insurance carrier: that petitioner, electing to sue the street car company, had recovered judgment in the District Supreme Court, which the District Court of Appeals had reversed and remanded for further proceedings, *Washington Ry. & Electric Co.* v. *Chapman,* 65 F. (2d) 486: that petitioner had then discontinued his suit and pressed his application for compensation before the Deputy Commissioner, who denied it on the ground that petitioner had failed to pursue to final judgment his remedy against the third party. The present suit was dismissed by the District Supreme Court on motion of the Insurance Company. The Court of Appeals affirmed, 78 F. (2d) 233, holding that, as the petitioner had elected to pursue his remedy against the third party, and as the statute of limitations had run while the suit was pending, his failure to proceed to final judgment operated to discharge the employer and the insurance carrier.

While by § 33 (a) of the Compensation Act the employee may elect to pursue his remedy against a third person, election does not deprive him of his right to compensation. See *Lumbermen's*

Mutual Casualty Company v. *Lowe,* 70 F. (2d) 616. By § 33 (f) the employer or the insurance carrier who, by §§ 32 (a), 35 and 36 is substituted for the employer, remains liable for any amount by which the recovery against the third person falls short of the prescribed compensation. Section 33 (a) only provides for release of the employer's liability for compensation when the claim against the third party is compromised without the employer's consent. In other respects his rights and liabilities, so far as he is in the position of a surety or indemnitor, are governed, as the court below held, by the general principles of suretyship.

Upon election of the employee to take compensation the employer is entitled to be subrogated to the rights of the employee against the third person. The insurer, who, as an indemnitor of the employer, and by the Act, stands in the place of the employer, is similarly entitled to subrogation. As with other indemnitors, his obligation may be discharged by release or other relinquishment of the principal liability which deprives him of his right of subrogation. *Aetna Life Insurance Co.* v. *Moses,* 287 U. S. 530; *Doleman* v. *Levine,* 295 U. S. 221, 225; *Travelers' Insurance Co.* v. *Great Lakes Engineering Works Co.,* 184 Fed. 426. Hence the only question for decision is whether the abandonment by plaintiff of his suit against the third party, after the running of the statute of limitations had precluded the possibility of bringing another suit, and in the circumstances disclosed by the record, is to be deemed so prejudicial to the insurer's right of subrogation as to operate as a discharge of its liability.

Whether, in any case, an indemnitor is discharged by the mere failure of his obligee to sue the principal debtor until suit is barred by the statute of limitations, remains an open question in this Court. See *Nelson* v. *First Nat. Bank,* 69 Fed. 798; *Gill* v. *Waterhouse,* 245 Fed. 75, answering it in the negative; contra: *Hayward* v. *Sencerbaugh,* 141 Ill. App. 395; *Auchampaugh* v. *Schmidt,* 70 Iowa 642; *Mulvane* v. *Sedgely,* 63 Kan. 105; *Johnson* v. *Success Brick Mach. Co.,* 104 Miss. 217; and see *Cheeseman* v. *Cheeseman,* 236 N. Y. 47, 51. It is unnecessary to decide it now. We assume for present purposes that petitioner's election to sue the third party followed by his discontinuance of the suit when the claim was barred by the statute is sufficient to discharge respondent from its obligation as an insurer, if prejudicial to its right of subrogation. We confine our investigation to the questions whether the fact of prejudice to this right is open to in-

quiry and, if so, whether the right is shown in the present circumstances to be so unsubstantial that respondent has not in fact been prejudiced by its loss.

It is generally true that the obligation of a voluntary surety is so far regarded as *strictissimi juris* as to be released upon a showing, without more, that the principal obligation has been modified or surrendered without the consent of the surety. *Sprigg* v. *Bank of Mt. Pleasant,* 14 Pet. 201; *Wood* v. *Steele,* 6 Wall. 80; *Porto Rico* v. *Title Guaranty & Surety Co.,* 227 U. S. 382; *Edwards* v. *Goode,* 228 Fed. 664; *United States Fidelity & Casualty Co.* v. *Pensacola,* 263 Fed. 344. But the strictness of this rule is relaxed in those jurisdictions where the failure of the creditor to prosecute his claim against the principal debtor after demand by the surety may be availed of as a defense by the latter. In that case the surety is discharged only to the extent of the loss which results. *Pain* v. *Packard,* 13 Johns. (N. Y.) 174; *Huffman* v. *Hulbert,* 13 Wend. (N. Y.) 377; *Herrick* v. *Borst,* 4 Hill (N. Y.) 650; *Hunt* v. *Purdy,* 82 N. Y. 486; see *Snow* v. *Horgan,* 18 R. I. 289, 291; cf. *Pickens* v. *Yarboroughs' Adm.,* 26 Ala. 417; *Wurster* v. *Albrecht,* 237 Ill. App. 284; *Bingham* v. *Mears,* 4 N. D. 437; *Thompson* v. *Watson,* 10 Yerg. (Tenn.) 362; but cf. *Shehan* v. *Hampton,* 8 Ala. 942; *Shenandoah Nat. Bank* v. *Ayers,* 87 Iowa 526; *Sullivan* v. *Dwyer,* 42 S. W. 355 (Tex. Civ. App.).

This follows from the fact that the surety's contract, not being one of guaranty, does not entitle him to have the creditor first assert his claim against the principal debtor. Failure by the creditor to perform any obligation to prosecute the claim arising out of his conduct subsequent to the contract, like his failure to realize upon subsequently acquired security, is a defense only so far as it is prejudicial to the surety. See *State Bank* v. *Edwards,* 20 Ala. 512; *Curan* v. *Colbert,* 3 Ga. 239; *Brown* v. *Executors of Riggins,* 3 Ga. 405; *Robeson* v. *Roberts,* 20 Ind. 155; *Mt. Sterling Improvement Co.* v. *Cockrell,* 24 Ky. Law Rep. 1151; *Springer* v. *Toothaker,* 43 Me. 381; *Humphrey* v. *Hitt,* 6 Grat. (Va.) 509; *Hyde* v. *Rogers,* 59 Wis. 154. The analogy to the present case, where the employee was not bound to proceed against the third person but elected to do so, is apparent.

Moreover, respondent is a compensated surety, whose premiums the employer is required to pay by § 32. The rule that any modification of the principal obligation releases the surety is also abated in the case of a compensated surety or indemnitor, who is dis-

charged only so far as his right is shown to be in fact prejudiced by action of the indemnitee. One who engages in the business of insurance for compensation may properly be held more rigidly to his obligation to indemnify the insured than one whose suretyship is an undertaking uncompensated and casual. *Atlantic Trust & Deposit Co.* v. *Laurinburg*, 163 Fed. 690; *Gunsul* v. *American Surety Co.*, 308 Ill. 312; *United States Fidelity & Guaranty Co.* v. *Poetker*, 180 Ind. 255; *State ex rel. Elberta Peach & Land Co.* v. *Chicago Bonding & Surety Co.*, 279 Mo. 535; *Royal Indemnity Co.* v. *Northern Ohio Granite & Stone Co.*, 100 Ohio St. 373; *Duke* v. *National Surety Co.*, 130 Wash. 276; cf. *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416. The insurer is given a right of subrogation not to enable him to avoid his undertaking to indemnify but that it may not be enlarged beyond that of indemnity. *Standard Marine Insurance Co.* v. *Scottish Metropolitan Assurance Co., Ltd.*, 283 U. S. 284, 288. He is not prejudiced by failure to prosecute a claim after it has been demonstrated to be groundless.

Application of these principles to an insurance contract under a compensation act such as the present does not require that an employee who has elected to proceed against a third person do more than prosecute his claim in a manner and to an extent which will avoid prejudice to the insurer's right of subrogation. The facts disclosed show that respondent has not been prejudiced. The judgment upon the first trial was set aside by the Court of Appeals because uncontradicted evidence established petitioner's contributory negligence so clearly that the trial judge should have directed a verdict for the defendant. The appellate court was nevertheless required by the rule of *Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364, to remand the case for further proceedings. Meanwhile, petitioner's main witness, the driver of the truck, had died. Petitioner, who was without funds, asked leave of the trial court to proceed with the second trial *in forma pauperis*, with the evident purpose of preserving, by this course, his rights against the insurer. His application was denied, presumably because it was thought a second trial would be fruitless. These circumtances are enough to establish, at least *prima facie*, that failure to proceed with a second trial did not prejudice the insurer. Respondent, insisting that it was discharged by the mere failure of petitioner to proceed further, regardless of prejudice, has offered no evidence that it did.

Reversed.